1343 No. 3989

1343

United States
Circuit Court of Appeals

For the Ninth Circuit.

EVA GAY, et al, Minors, by Guardian ad Litem,
Appellants,

vs.

H. FOCKE, et al,
Appellees.

Appellant's Brief

Upon Appeal from the Supreme Court for the Territory of Hawaii.

HENRY HOLMES,
H. EDMONDSON,
Attorneys for Appellants.

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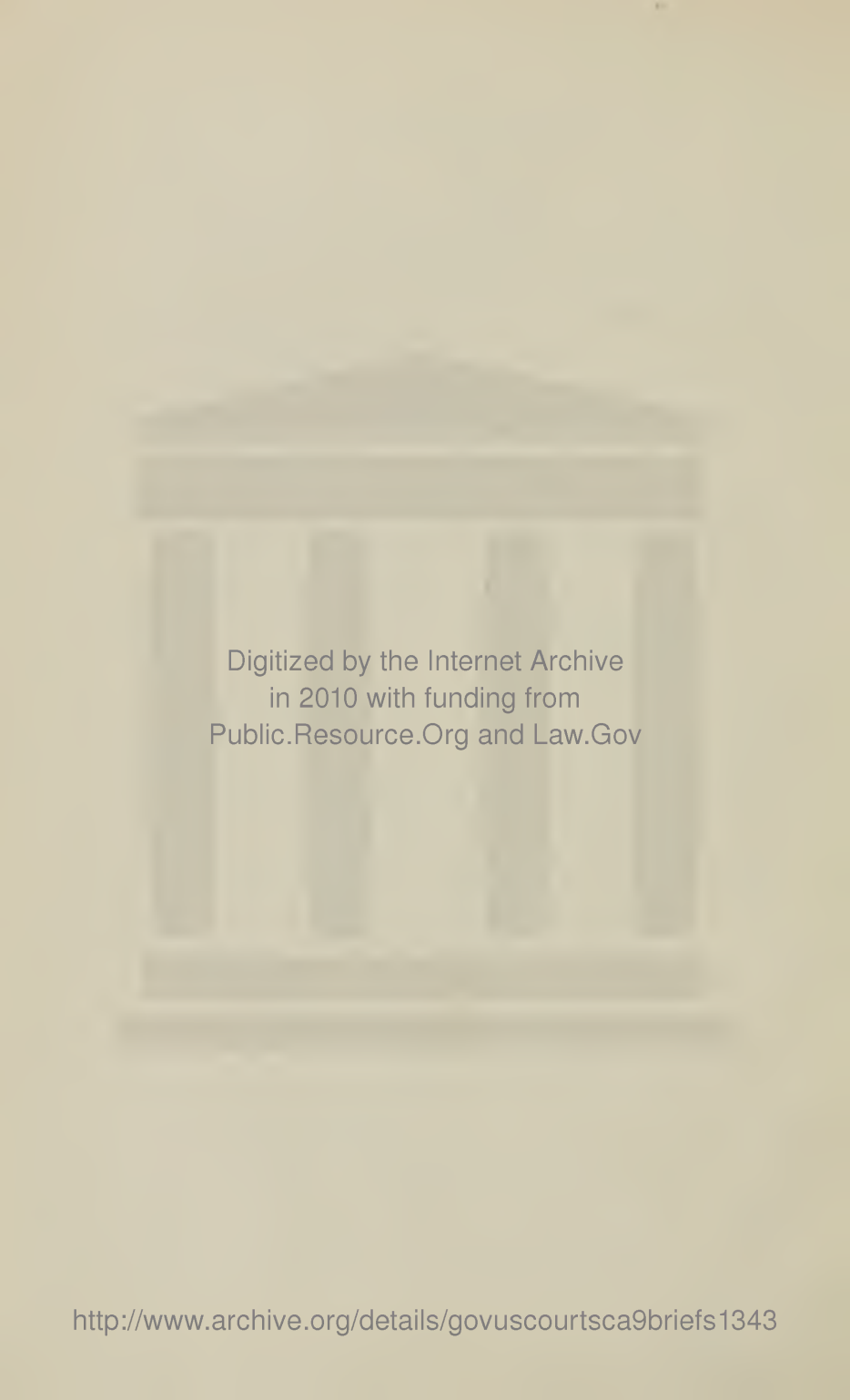

No. 3989

United States
Circuit Court of Appeals
For the Ninth Circuit.

EVA GAY, a Minor, BEATRICE GAY, a Minor, SONNY JAMES MOKULEIA GAY, a Minor, MICHAEL VANATTA K. GAY, a Minor, LLEWELLYN NAPELA GAY, a Minor, ALBERT GAY HARRIS, a Minor, WALTER WILLIAM HOLT, a Minor, ALICE K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor, by HARRY EDMONDSON, Their Guardian ad Litem,

Appellants,

vs.

H. FOCKE and H. M. von Holt, Trustees Under the Will of the Estate of JAMES GAY, Deceased, and LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY, ALICE MARY K. RICHARDSON, HELEN FANNY GAY and FRIDA GAY,

Appellees.

APPELLANTS' BRIEF.

THE CASE.

The Trustees Appellees. filed a bill in equity for instructions as to their duties as trustees under the will

of James Gay, deceased. All parties in being interested under the will were made respondents; they are the children and grandchildren of the testator; the minors are the grandchildren, by their guardian ad litem appellants, to whom the corpus, with all additions or increase of the estate was given; the appellees other than the Trustees are the surviving children for whose maintenance and support for life the Trustees were directed to pay the income of the estate. (Record 1-16)

The will gave all testator's estate to trustees in trust to pay the rents, income, issues and profits arising from and out of said estate to testator's widow for her life and after her death for the support and maintenance of his children, including the education of his daughters, for their lives and after their death to convey one-half of said trust estate and all additions or increase thereto to the children of testator's sons, and as to the remaining portion of said trust estate and all additions or increase thereof to convey the same to the children of his daughters. This disposition of the estate was followed by a direction to manage and carry on testator's business so long as it could be done so profitably, and a power to the trustees in their discretion when they thought a sale of all testator's property at Mokuleia would by a reinvestment of money realized from a sale be beneficial and inure to the benefit of or increase the trust estate to sell the property at Mokuleia. (Record 13-16)

Testator died in 1893 and his widow died in 1895. (Record 121 and 123) (The statement "Mr. Gay

died, in April 1895" Record 123 is a copyist error and should refer to Mrs. Gay.) His estate consisted of two valuable leaseholds, and other personal property which latter the trustees sold for $4065.00 and hold as corpus. One leasehold at Mokuleia was for a term of fifty years and will expire in 1934; the other leasehold expired in 1908. (Record 121-123) The existing Mokuleia leasehold is still held by the trustees and the property is all sub-let for the unexpired term of the head lease and has produced and still is producing large rentals in excess of the rent paid under the head lease. (Record 127-128) The other lease was held and the property was sub-let by the trustees until the lease expired, and produced net rentals which totaled $34,329.24. (Record 135-136)

The trustees paid all the net rentals of both leaseholds to testator's widow and children as income and set aside no part thereof as corpus. Their counsel questioned this conduct and therefore they brought this suit for instructions whether they should not in the past have set aside and ought not in the future to set aside part of the rents as corpus for testator's grandchildren. (Record 9-11, 125-126).

The existing Mokuleia lease is part of the property at Mokuleia referred to in the will, and we shall hereafter refer to it as the "Mokuleia leasehold". The expired lease we will call the "Ookala leasehold".

The Circuit Judge who heard the case in the first instance approved the trustees' conduct in paying the whole of the net rentals to the wife during her life and on her death to the children. (Record 29-43) The

grandchildren by their guardian ad litem appealed to the Supreme Court of the Territory which partly reversed the Circuit Judge and held:

(1) That the trustees should have sold the Ookala lease and invested the proceeds as corpus, but, as they had retained it, they must set aside out of the rentals its value as part of the corpus of the estate and remanded the cause for an accounting; and

(2) That the trustees, being directed to carry on testator's business and being given a discretionary power of sale of the property at Mokuleia, could, so long as they refrained from selling the Mokuleia leasehold, pay all the net rentals to testator's children as income. (Record 44-63)

The cause having been remanded, (Record 67) the Circuit Judge held that the sums of money, which, if invested at the time of testator's death, with interest at six per cent. per annum with annual rests, would equal the net rentals received, when they were received, from the Ookala leasehold, were corpus, and that the balance of the net rents was income. (Record 70) The grandchildren by their guardian ad litem again appealed to the Supreme Court which sustained the decision of the Circuit Judge (Record 73-78) and a final decree was entered (Record 85) from which for the first time the grandchildren by their guardian ad litem were able to appeal to this Court.

This appeal brings up for review so far as they affect the grandchildren only—as neither the children nor the trustees have taken any appeals at all in the case—both decisions of the Supreme Court.

ASSIGNMENTS OF ERROR

1. The Court erred in not holding that, under the terms of the will dated May 25, 1893, of James Gay, deceased, the net rents, or, their actuarial value as of the testator's death on May 28, 1893, derived from subleases of certain leasehold property held by the testator, at the time of his death, consisting of about 2500 acres of land situate at Mokuleia, Island of Oahu, for a term of 50 years from May 1, 1884, (hereinafter referred to as the "Mokuleia lease"), form part of the corpus of testator's estate given in trust for testator's grandchildren, to wit: the minor respondents above named Appellants.

2. The Court erred in finding ("find" in Record page 89 is a copyist error) and holding that, under the terms of said will, whatever sums the trustees received for the said Mokuleia lease, to wit: the net rents derived from the sub-leases ("sublease" in Record page 89 is a like error) thereof, were income and that the life tenants (being all but one of testator's children named in his will and the issue of one deceased child) were entitled to receive it.

3. The Court erred in not holding under the terms of the said will that it was open to the trustees upon receiving proper security to give the life tenants the use of the net rents as they were received from subleases of the land comprised in the said Mokuleia lease, and, that in paying the same to the life tenants and the life tenants in receiving the same, they must be deemed or held to have elected this method of

reinvestment of the net rents which comprised part of the corpus of the said estate.

4. The Court erred in not holding under the terms of said will that the trustees thereof, in sub-leasing all the land comprised in the said Mokuleia lease for the unexpired period except the last few days of the said term thereof, in effect sold the said Mokuleia lease at a price payable by installments, such price being the net annual sums received for same; and that the amounts so received and to be received from such sub-leases or their value as of testator's death form part of the corpus of testator's estate.

5. The Court erred in finding and holding under the terms of the said will that the trustees thereof did not, by subleasing all the land comprised in the said Mokuleia lease, in effect, sell the said Mokuleia lease at a price to be paid for in installments; and, that the net amounts received from such sub-leases were not corpus but income of the estate payable to the life tenants.

6. The Court erred in not holding under the terms of the said will that the net rents amounting in the aggregate to $34,329.24, received from sub-leases of certain leasehold property held by the testator at the time of his death, consisting of about 1200 acres of land situate at Humuula, Ookala, Island of Hawaii, for a term of 25 years extended for a further term of 7 years and ultimately expiring March 1, 1908, (hereinafter referred to as the "Ookala lease"), all formed part of the corpus of testator's estate.

7. The Court erred in finding and holding under

the terms of said will that only $20,668.35, a part of $34,329.24, the net rents received by the trustees from sub-leases of the land comprised in the said Ookala lease, should have been invested as capital or corpus of the estate; and that the balance of $13,660.89, a part of said net rents, should be distributed to life tenants as income.

8. The Court erred in not holding under the terms of said will that it was open to the trustees, upon receiving proper security, to give the life tenants the use of the net rents as they were received from sub-leases of the land comprised in the said Ookala lease, and, that in paying the same to the life tenants and the life tenants in receiving the same, they must be deemed or held to have elected this method of re-investment of the net rents which comprised part of the corpus of the said estate.

9. The Court erred in finding and holding under the terms of said will that the trustees at the inception of the trust might not (by analogy to a direct gift of money for life) have paid the rents as received to the tenants for life upon receiving reasonable security to preserve the fund for the remaindermen, and that the only course which the trustees had an absolute right to pursue was to promptly convert the wasting assets into an authorized permanent investment and pay the income derived therefrom, whatever it might be, to the life tenants and preserve the capital amount for the remaindermen.

10. The Court erred in finding the issues on the construction of the will for the life tenants, respondents

above named other than said minor respondents.

11. The Court erred in not finding the issues upon the construction of the will for the minor respondents appellants.

12. The Court erred in decreeing that the decree appealed from should be affirmed.

13. The Court erred in not decreeing that the decree appealed from should be set aside.

14. The decree is against the manifest intention of the testator as expressed in his will.

15. The decree is against the manifest weight of evidence.

16. The decree is contrary to law.

(Record 89-93)

These assignments of error raise two points: first, and by far the most important, that the net rents or part of them from the Mokuleia leasehold are corpus, and second, the method of determining how much of if not all, the net rents from both leaseholds are corpus.

ARGUMENT

Testator left three sons and four daughters, all of whom, with the exception of one daughter who died in 1902, are appellees. The youngest child is now at the time of writing this brief 33 or 34 years, and the eldest is 45 years old. (Record 123).

Testator's estate consisted of the following property in the Hawaiian Islands:

1. The Mokuleia lease dated May 27, 1884, from J. P. Mendonca to testator, of about 2500 acres of

land at Mokuleia, for 50 years from May 1, 1884, expiring May 1, 1934, at an annual rent of $1250.00.

2. The Ookala lease dated March 1, 1876, from the Government of Hawaii to testator, of about 1200 acres of land at Ookala, for 25 years expiring March 1, 1901, extended during the life of testator for a further term of 7 years expiring March 1, 1908, at a nominal rent or rent free;

3. Cattle, etc., valued at about $2,310.00; and

4. Cash—$816.59.

There was no real estate (Record 121-122)

At the time of his death testator carried on a horse and cattle ranch on part of the Mokuleia leasehold and part of it was sublet to others at gross annual rents amounting to $2,723.50 (Record 123).

The trustees carried on testator's business of stock raising and sub-letting part of the property at Mokuleia until 1906, when they sold all the live stock and set aside the net proceeds of $4,065.00 as corpus, and sub-let for the residue of the term of the head lease the whole of the remainder of the Mokuleia leasehold property and none of the said land was in their actual possession after that date, thus converting their entire land holdings into rents or the right to receive the same. Some of the sub-leases reserved fixed cash rentals and others a one-twentieth part of the produce of sugar cane crops. (Record 123-124).

A statement of rents received from the Mokuleia leasehold property is shown on pages 127-128 of the Record which to save reprinting is incorporated here by reference.

The total rents as shown in the statement viz., $281,033.76, is approximate and is subject to correction. From it must be deducted the rent paid under the head lease of $1,250.00 for 26 years, namely $32,500.00, leaving approximately $248,533.76, from which would also have to be deducted trustees' commissions and expenses of administering the trust none of which appear in the evidence. (Record 128)

No further returns of rents had been received when the hearing was had in January, 1920.

Sub-leases of the Ookala leasehold property produced over and above all expenses $34,329.24 as shown on pages 134-136 of the Record, which statement to save reprinting is incorporated here by reference.

The evidence shows that in 1893 the trustees were given an estate from which they have received, as stated above, approximately $248,533.76 from the Mokuleia leasehold, and $34,329.24 net rents from the Ookala leasehold, in addition to $4,065.00 net proceeds of sale of the stock on the ranch at Mokuleia. Except the sum of $4,065.00 above mentioned, and the sum of $20,668.35, which the trustees were instructed by the Court below on appeal in this proceeding to set aside as the corpus of the Ookala leasehold, the only remaining asset of the estate if the decision be sustained will consist of the unexpired term of the Mokuleia lease or, as all of the land is subleased, the rents reserved in sub-leases of that leasehold, all of which will expire with the leasehold on May 1, 1934. If this method of administering the estate which has been

followed since 1893, that is, of paying all the net rents to the life tenants, be continued, an estate which has already yielded and enabled the trustees to pay to life tenants, the approximate sum of $262,194.65 and, if the annual rents for the remainder of the term amount to half of the rent produced during the year 1919, will yield and enable the trustee to pay to them the additional sum of $181,004.32, will be represented by the sum of $24,733.35, less certain counsel fees allowed in this proceeding and which have been paid out of corpus. As the trust is to continue until the death of the last survivor of the remaining six of James Gay's children, the youngest of whom in 1934 will be 45 and the eldest 56 years old, if they continue to live, the trustees must carry out the trust to support and maintain these six children, or such of them as shall be living, out of the income of the investment of less than $25,000.00, which if invested to yield six per cent per annum will produce less than $1500.00, from which must be deducted trustees' commissions, court and other expenses of administering the trust, leaving approximately $1200 per annum for support and maintenance of testator's children, in place of an average of over $10,000.00 a year which the trustees have paid over to the children.

We will examine the will, a copy of which was admitted in evidence (Record 13-16, 120), under which this conduct, it is contended by appellees, was authorized. After appointing the executors and trustees and directing them to pay his debts and funeral expenses, the testator said:

"I hereby give, devise and bequeath unto Mary Ellen Gay and my friend Hermann Focke all my estate real personal or mixed and wheresoever situate in trust nevertheless for the uses and purposes hereinafter set forth, that is to say: to pay the rents income issues and profits arising from and out of my said estate to my wife Mary Ellen Gay for the term of her natural life, and to be applied by her for the support of herself and the support maintenance and education of my children born of the body of my said wife Mary Ellen. And from and after the death of my said wife I direct my said trustees Hermann Focke or his successor in said trust to pay the rents, income, issues, and profits arising from and out of said trust estate as follows: one-half thereof for the support and maintenance of my sons Llewellyn Napela Gay, Reginald Eric Gay and Arthur Francis Gay share and share alike; and as to the other part thereof to pay the same for the support maintenance and education of my daughters Alice Mary K. Gay, Ethel Pauline N. Gay, Helen Fanny Gay, and Frida Gay, share and share alike.

"And from and after the death of all my children born of the body of my said wife Mary Ellen I direct my said trustee or his successor to convey one-half of said trust estate and all additions or increase thereto, unto the children of my sons Llewellyn Napela Gay, Reginald Eric Gay and Arthur Francis Gay share and share alike and the child or children of any deceased child to take the parents share. And as to the remaining portion of said trust estate and all additions

or increase thereof, I direct my said trustee or his successor in said trust to convey the same unto the children of my said daughters, Alice Mary K. Gay, Ethel Pauline N. Gay, Helen Fanny Gay and Frida Gay, share and share alike, and the child or children of any deceased child to take the parents share.

* * *

"It is my wish and I hereby direct that my said Trustees or their successors or successor, shall manage, conduct and carry on the business of ranching and stock raising at Mokuleia on the Island of Oahu, so long as it can be done so, profitably, and without loss; and I hereby empower them or their successors or successor at any time when in their discretion they think that a sale of all the property at said Mokuleia, would by a reinvestment of the money realized from such sale of said property be beneficial and inure to the benefit of or increase the Trust estate created under this will, to sell and convey the said property at Mokuleia free and barred of the trust created by this will."

The will is in a very simple form; the property is given to the trustees upon trust to pay the income thereof to the widow for life and on her death to pay the income for the maintenance and support of the children during their lives, including the education of testator's daughters, and, on their death, to convey one-half of said trust estate and all additions or increase thereto to the children of testator's sons, and, as to the remaining portion of said trust estate and all additions

or increase thereof, to the children of testator's daughters.

It is impossible to imagine a simpler will involving a trust, about which trust no difficulty has arisen, and if the estate had consisted of a block of bonds no difficulty could have arisen because all that the widow would receive would be the income of the bonds, the children, maintenance, support and education out of that income, and at their death the bonds would go to the grandchildren.

Where the estate, as here, consists of leaseholds, or, also as here, sums of money representing the rents yielded by the leaseholds, does the difference in the nature or kind of the estate change the nature of the gift?

"Generally, a will is not to be construed by anything 'dehors', where there is no latent ambiguity, and parol evidence is not admissible to show the intention of testator against the construction on the face of the will, *and the state of his property cannot be resorted to, to explain the intention.*"

Heslop vs. Gatton, 71 Ill. 528.

See also:

Wentworth vs. Read, (Ill.) 46 N. E. 777;

McGough vs. Hughes, (R. I.) 30 Atl. 851;

Martin vs. Palmer, (Ky.) 234 S. W. 742, 743;

Parrott vs. Crosby, (Ky.) 201 S. W. 13;

Haupt vs. Michaels, (Tex.) 231 S. W. 706, 708-9;

Coffman vs. Coffman, (Va.) 109 S. E. 454, 457.

"Evidence of extrinsic circumstances, such as the testator's relation to persons, or the *amount and condi-*

tion of his estate, may be admitted to explain ambiguities of description in the will, *but never to control the construction or extent of devises thercin contained."*

Barber vs. Pittsburgh etc. Ry., 166 U. S. 83, 109.

If an estate instead of consisting of the sum of $1000.00± had consisted of an annuity of $100.00± per annum for ten years, would it be contended that if the income only of the estate were given the children for life and on their death the estate was to be given to testator's grandchildren, in the first case the children would receive only the income of the $1000.00, and in the second, the annual payments of $100.00 as received so that the grandchildren would receive nothing if the children survived the ten year period? The answer would be certainly not, as the estate only consisted of these ten annual payments which were finally given to the grandchildren, the intermediate income thereof only being paid to the children. Surely because these annual receipts consist of rents would afford no reason for treating them differently.

There is no dispute as to the meaning of the words of this will, and consequently no need to refer to any rules or other cases to determine testator's intention.

The law applicable to the case is fundamental:

First, that in the constuction of wills the intention of the testator as expressed in his will must prevail.

"And all rules and presumptions are subordinate to the intention of testator where that has been ascertained. *The intention will control any arbitrary rule, however ancient may be its origin."*

28 R. C. L. "Wills" sec. 173 at p. 214.

Second, where the intention is clear there is no room for rules of construction except that mentioned above.

Where the language of the instrument is unambiguous and perfectly clear, there is no field for the play of construction; where the maker of the instrument has clearly expressed one intention the court cannot impute another.

Rules of construction are only involved or applied to remove *doubts which the words of the instrument create.* This is the "raison d'etre" for their existence.

Here, until the property of the deceased was known, no question could have arisen. But the words of a will, the meaning of which is clear, cannot be changed nor can such meaning be altered by knowing what the property consists of; that is, the property of a testator cannot be looked to in order to change the meaning of the words, which is clear.

The testator made only two dispositions of his "estate" ("all my estate real personal or mixed") which means everything he had when he died, after payment of claims—debts, funeral and testamentary expenses. The first disposition is to his trustees in trust; and the second is to convey "said trust estate" with "all addition or increase thereto" (or thereof) to the testator's grandchildren on the death of all of the testator's children. What was the trust upon which the trustees were to hold the estate which terminated on the death of all of his children?

The will provides

"I hereby give, devise and bequeath unto Mary Ellen Gay and my friend Hermann Focke all my

estate real personal or mixed and wheresoever situate in trust . . . . to pay the rents income issues and profits arising from and out of my said estate to my wife . . . . ." for life, "And from and after the death of my said wife I direct my said trustees . . . . . to pay the rents, income, issues, and profits arising from and out of said trust estate as follows: one-half thereof for the support and maintenance of my sons . . . . and as to the other part thereof to pay the same for the support maintenance and education of my daughters . . . ."

Though there was no real estate, as the will speaks from the date of death in Hawaii, it was wide enough to include any real property which might subsequently be acquired by purchase, devise, inheritance or otherwise; and in using the words "rents, income, issues and profits" it is clear from the will that the word "rents" refers to the "real" property; that the word "income" refers to the "personal" property; and that the words "issues and profits" refer to the "mixed" property and the profits of the business. The Supreme Court of Hawaii sustained this contention and said

"Under these circumstances we cannot say that the word 'rents' refers to anything more than the real estate which the testator might have acquired between the making of his will and his death and which would have passed by his will in the form he made it had he acquired any." (Record 58)

The life tenants contended in the courts below that as the will used the word "rents" in the connection "rents income issues and profits arising from and out of my estate" or "said trust estate" and the estate con-

sisted chiefly of rents, the rents themselves from the Ookala and Mokuleia leaseholds, (that is to say the "trust estate" itself,) were given to the testator's children. This contention however was not upheld. (Record 59-61)

Nor could it well be, if a leasehold is subleased at the same rental as that reserved by the lease, the leasehold has no value; if subleased at a higher rental the difference in the rentals determines the value of the leasehold, that is, what it is worth. The worth of the leasehold is its capital value. A bequest to trustees of an estate which included a leasehold, upon trust to pay the income of the estate to one for life and on his death to convey the estate to another, could not be carried out by paying to the first taker all of the rent received, because the rent is the "estate" not the "income" of the estate. And if the rents as received were paid to the first taker the whole of the estate would disappear if the first taker survived the term of the lease.

A reasonable interpretation must be given the will so that, where possible as here, all its provisions will harmonize and can be carried out, rather than an arbitrary interpretation which will defeat the purpose of the will.

The next disposition of the testator's estate was as follows:

"And from and after the death of all my children . . . . . I direct my said trustee . . . . . to convey one-half of said trust estate and all additions or increase thereto, unto the children of my sons. . . .

And as to the remaining portion of said trust estate and all additions or increase thereof, I direct my said trustee . . . to convey the same unto the children of my daughters . . . "

Are the words by which the testator gave devised and bequeathed his estate, real personal and mixed to his trustees upon trust more potent to transfer to the trustees what he possessed than a conveyance by the trustees of the said *trust estate* to transfer the same property to the grandchildren in execution of a trust to convey? Is there any reason for construing the words "all my estate" in the bequest to the trustees as including more than the words "my said trust estate" with all additions or increase thereof in the ultimate trust to convey to the grandchildren?

If the ultimate trust stood alone and there was merely a bequest to the trustees upon trust to convey "my said trust estate to my grandchildren" on the happening of a future event, could it be questioned that the whole estate would go to the grandchildren?

What words in the will can be found that say that the trustees shall convey to the grandchildren less than the estate given to the trustees themselves?

The will provides:

"It is my wish and I hereby direct that my said trustees * * * shall manage, conduct and carry on the business of ranching and stock raising at Mokuleia on the Island of Oahu, so long as it can be done so, profitably, and without loss; and I hereby empower them * * * at any time when in their discretion they think that a sale of all the property at said Mokuleia, would

by a reinvestment of the money realized from such sale of said property be beneficial and inure to the benefit of or increase the Trust estate created under this will, to sell and convey the said property at Mokuleia * * * "

The Court below in its decision states:

"Their (life tenants) main argument is based upon that portion of the will which directs the trustees to carry on the business of ranching at Mokuleia so long as it can be done profitably and without loss and invests them with a discretionary power to sell the property at Mokuleia. As applied to the Mokuleia lease we think their reasoning sound. If the conversion was required at all it must take place as soon after testator's death as may be. The direction to the trustees to 'manage, conduct and carry on the business of ranching and stock raising at Mokuleia' and the discretion with which the testator invested the trustees in the matter of selling 'the property at said Mokuleia' are both inconsistent with the intention that the property was to be converted, for if they had the right to retain the property until 'in their discretion they think that a sale of all of the property at Mokuleia would by reinvestment of the money realized from such sale of such property be beneficial and inure to the benefit of or increase the trust estate created under the will', they may retain it for years or, indeed, may never convert it at all, and if so, they are only exercising the discretion given to them by the will." (Record 61-62).

Their conclusion then was:

"If, as we have concluded, the trustees were author-

ized under the terms of the will to retain the head lease, whatever sums they received for its use were income and the life tenants entitled to receive it." (Record 62).

The Court below, therefore, held that if a testator gives a power of sale to trustees of a leasehold to be exercised when in their discretion they think a sale would be beneficial and inure to the *benefit of or increase the trust estate,* the trustees need not exercise the power and "whatever sums they received for its use (meaning the whole of the rents) were income and the life tenants entitled to receive it," "indeed may never convert it at all" even if in their discretion they think a sale would be beneficial and inure to the benefit of the estate? The cases are all one way and clear that "where the power to postpone conversion is (as here) for the purpose of selling the property to the best advantage and there is no indication that the power is inserted for the benefit of the tenant for life as against the remaindermen, the rule in Howe v. Dartmouth applies. Brown v. Gellatley, L. R. 2 Ch. [1866-7] 751 at page 757; Furness vs. Cruikshank (N. Y.) 130 N. E. 625 at pages 626, 627. (Cited below: decided 1921.) How a discretionary power of sale to benefit an estate can be resolved into a power to put that estate out of existence is, of course, not explained by the decision.

Did the testator intend, by giving the trustees the power at any time to sell when in their discretion a sale would be beneficial to and inure to the benefit of or increase the trust estate, that, by making the time

when they were to sell *discretionary,* they were to have power to dissipate the trust estate in the meantime, and that if they did not decide to sell at all (because such a course would be more advantageous to the trust estate?) they need not account for any of the trust estate to the grandchildren? The reason for making the power discretionary is so that it can be exercised or not, as it will or will not benefit the trust estate.

In Furniss vs. Cruikshank (N. Y.) 130 N. E. 625, (decided 1921 and not cited to our Supreme Court at the time, in 1921, it decided the Mokuleia question, but cited with approval by that Court in its opinion dated February 28, 1922, Record, 78), testator created a trust fund for his daughter for life. The estate consisted of personal property, productive real estate, and unproductive real estate. Between 1885 and 1902 the unproductive real estate was sold for $356,760.89 net, which was regarded as capital. The daughter claimed that $164,474.36 thereof should be regarded as income. The will contained this provision:

"I hereby declare that all the powers herein given are intended to be *discretionary* and to be exercised or not as said executors or trustees should deem proper * *."

The Court said, p. 627:

"We reach the conclusion that the intention of testator as derived from the will was to effect an equitable conversion of his real estate—*not to leave it to his trustees to determine in their discretion whether or not a sale should ever be had* * * *"

On p. 626 the Court said:

"* * * and if the testator directs the trustees to sell only if and when they think it wise * * * in such case there is a clear declaration that what the testator has in mind is to benefit the principal of his estate."

In Brown vs. Gellatly, L. R. 2 Ch. (1866-7) 751, testator was engaged in the shipping business and empowered his trustees to sail the ships for the purpose of making profit. At page 757 it says:

"But in giving that power he does not give it as a power to be exercised for the benefit of the tenant for life as against the parties in remainder * * * *but says that it is to be exercised for the benefit of the estate."*

The decision of the court below itself wholly ignores the intention of the testator as expressed by the words of his will. If it be sustained then (1) the estate given to the trustees upon trust cannot be conveyed by them to the grandchildren as the will provides; (2) the bulk of the estate or corpus—the rents derived from the sub-leases—will be given to the persons entitled only to receive the income thereof; (3) the direction to carry on the business will entitle the first takers to receive the capital as profits; and (4) the power to sell all the property at Mokuleia when they think a sale would by reinvestment of the money realized from such sale be beneficial and inure to the *benefit of* or *increase* the trust estate created under this will (the benefit of or increasing the trust estate being almost the last thought in the testator's mind when he made his will) can be postponed or never exercised with the result that effect will not be given testator's intention at all.

Suppose a co-partnership or corporation held a lease as part of its assets when it commenced business and that the leasehold was sublet at profitable rentals. The co-partnership or corporation could not pay out all the rentals they received as "profits" of the business or dividends, because the leasehold would represent a capital asset and they would be obliged to create a reserve fund to represent the lease when it ultimately expired.

Our contention is that the intention of the will is clear that all the life tenants were to receive was the profits of the business, conducted of course as a business should be, while the business was carried on, and the income of the estate, of the nature of profits, during their lives, and that on their death the trust estate given to the trustees, though not necessarily in the same form, should be conveyed by them to the grandchildren.

Does the provision of the will referred to mean that the Mokuleia leasehold should disappear from the estate if it was not sold? Can the provision have this effect when Testator speaks of a *re*investment which might be *beneficial* and inure to the benefit of or *increase the trust estate*. When a testator speaks of increasing and benefiting his estate, how can the trustees justify a course of conduct by which it is to be lost?

The only alternative course to selling the leasehold is to keep it until it expires. If keeping it means (as the Court below held in effect) it is to be a total loss to the trust estate, i. e. to the corpus, then there can be

no question but that an immediate sale would be beneficial to the trust *estate,* and the refusal of the trustees to sell would be arbitrary. It is too obvious to argue that the testator did not mean a total loss should follow an exercise of the trustees' discretion not to sell. The will shows that the testator meant his trustees should preserve his estate from loss whether they sold or not. There are no grounds stated by the Court below for holding that the trustees were justified in paying to the life tenants all the rents from the Mokuleia leasehold; except that the discretionary power to sell showed the trustees were not obliged to convert and therefore the rents of the leaseholds belonged to the tenants for life.

Actual conversion must be clearly distinguished from an *equitable* conversion. The Courts below failed to grasp the difference. Actual conversion as its name denotes is where there is an actual change of the property into some other property of a different nature. Equitable conversion is where there has in fact been no sale, but the court considers that as done which ought to have been done. The cases are unanimous in holding that this rule of equitable conversion is applied not from any expressed intention of the testator that there must be a sale, but simply as a means (the cases say "as a convenient means") of adjusting (calculating) the equities (how much each is entitled to) between life tenants and remaindermen.

We have said that the intention of the Testator can be ascertained from the words of the Will without applying rules of construction, and that all that was

given under the will to the wife and children did not amount to more than the rents, income, issues and profits of the estate, these words being all used in this will in the sense of profits or income as distinguished from capital, and not the actual receipts in the case of wasting assets; and this we submit is clearly shown by the direction to manage, conduct and carry on Testator's business so long as it can be done *profitably*. But in addition we have in support of appellants' case the broad legal principle that "where residuary personal estate is settled by will for the benefit of persons in succession, all parts of it as are of a wasting or future or reversionary nature or consist of unauthorized securities must be converted or treated as converted into property of a permanent and income-bearing character unless the will otherwise directs."

Such a principle is implicit in all such wills. It would be impossible otherwise for a trustee to carry out the words of such a will to convey the estate to the remaindermen on the death of a life tenant if he retained wasting property and paid the proceeds—the capital—to the life tenant.

If, however, a testator really intends that the life tenant shall receive these proceeds and that the remaindermen shall only take what is left when the life tenant dies, this intention is regarded, but this intention must either appear or be inferred from the contents of the will.

The case presented by the appellees in the Court below called for the construction of "rents income issues and profits", as meaning the actual receipts of or from

the leaseholds, and contended that the legal principle mentioned above did not apply as the will contains an intention that the life tenants shall receive them at whatever cost apparently to the estate. There is not one word that does so: nothing that throws a doubt upon the clear intention to preserve the trust estate.

The contention of the appellees was that the rule of equitable conversion as laid down in Howe v. Dartmouth and which it is admitted, if applicable, is conclusive of the case, is not applicable here and that the case comes under one or other of the exceptions to that rule.

The rule in Howe v. Dartmouth (1802) 7 Ves. 137, has been stated as follows:

"In the absence of anything to the contrary in the will the donee of a life or other limited interest in the the income of the residue of a testator's personal estate is, in so far as such estate consists of wasting or reversionary interests or unauthorised securities, entitled not to the actual income of such interests but to the income which such interests would produce if they were at the Testator's death sold and the proceeds invested in trust securities."

The facts in that case were:

Testator left all his personal and real estate to his wife for life and then to his sister for life, with absolute gifts over. The personal estate consisted, among other things, of annuities. It was held among other things that the annuities being wasting securities, as between the life tenants and the remaindermen, they must be *treated* as sold from the time the executors

should have sold them; "as between the lifetenants and the remaindermen they must be *treated* as sold", not that they must be actually sold but only treated as sold for the purpose of adjusting the respective rights of the parties. And this rule applies even when the sale is properly postponed under a power to do so. In re Chaytor, Chaytor v. Horn, 1 Ch. 233.

The rule is based upon an implied or presumed intention of the Testator and not upon any intention actually expressed by him, and its purpose is to carry out the principle of the law that the trustee must act impartially between the beneficiaries.

As the rule is stated above it applies only in the absence of anything to the contrary. And what the English Courts have decided will be deemed to the contrary have been classed as follows:

(a) Where the Testator has indicated an intention that the wasting property should be enjoyed in specie;

(b) Where the will contains a direction or implication contrary to the rule;

(c) Where the will confers on the trustee a discretion to postpone such conversion which he bona fide and impartially exercises and such discretion is *not* given to be exercised for the benefit of the estate.

(See Furniss v. Cruikshank (N. Y.) 130 N. E. 625 and Ott v. Tawkesbury, 75 N. J. Eq. 4, where the cases are collected and discussed, but where the Court nevertheless held, although the will in each case contained a discretionary power of sale, that the rule of equitable conversion applied and the corpus must be maintained.)

We will deal with these exceptions separately:

(a) Where the Testator has indicated an intention that the wasting property should be enjoyed in specie.

The case does not come under this head.

Testator, having given all of his estate to his trustees upon the trusts of his will, directs that his Trustees shall manage, conduct and carry on the business of ranching and stock raising "so long as it can be done so *profitably* and without loss". Surely a gift of property to trustees with a direction to carry on Testator's business therewith, followed by a power to sell for the benefit of the estate, is repugnant to an intention that the property should be enjoyed by life tenants in specie. The trustees could not carry on the business with the life tenants in possession.

Underwood v. Underwood (Ala.), 50 So. 305.

Armingan v. Reitz (Md.) 46 Atl. 990.

Kinmonth v. Brigham "infra."

(b) Where the Will contains a direction or implication to the contrary.

A contrary direction or implication is shown where the will contains an express *general* power (*without stating any object or purpose for which it is given*) to the trustees to retain any portion of the estate in the same state in which it should be at testator's death, or any indication showing an intention to favor the life tenants as against the remaindermen. There is no *express* power in this will given to the trustees to retain any portion of the estate in the condition it was in at Testator's death. For the purpose of carrying out the direction to carry on the business and of choosing the

best time to sell, after the trustees cease to carry on the business because they cannot do so profitably, they must retain it, *but for no other purpose.*

But where is there any intention in the Gay will to prefer the life tenants at the expense of the estate? The property is retained for two express purposes (1) to enable the trustees to carry on the testator's business so long as this can be done profitably and (2) for the purpose of selling the property to the best advantage: "when in their discretion they think that a sale of all of the property would by a reinvestment of the money realised from such sale of said property be beneficial and inure to the benefit of or increase the Trust estate".

(c) Where the Will confers on the trustee a discretion to postpone such conversion which he bona fide and impartially exercises and such discretion is not given to be exercised for the benefit of the estate.

There is here no expres power or direction to postpone conversion: Appellees' contention, and it was adopted by the Court, was that it is implied from the power to sell, but this power of sale following immediately the direction to carry on the business so long as it can be done profitably, and which must be exercised when they considered a sale would be beneficial and inure to the benefit of the Trust Estate, shows completely that the discretion to postpone the conversion was only and wholly for the purpose of being "beneficial and inure to the benefit of or increase the Trust estate created under this Will". It is the benefit of the trust estate and not the favoring of the life tenants at

the expense of the remaindermen that the trustee had to consider.

It is clear that when the testator bequeaths his estate real, personal and mixed to trustees (not to the life tenants) upon trust and his estate is to be increased during the period of the trust, and says expressly that his trustees shall convert when it will benefit his estate, that the estate with all additions or increase thereof shall be conveyed to the grandchildren, and that the income is to support and maintain the children, the testator surely does not intend to favor the first takers at the expense of the grandchildren, and by giving his trustees a discretion to sell when such sale would benefit his estate, he does not intend such discretion to interfere with the way his property is disposed of. If the exercise of the trustees' discretion is to benefit anybody or anything the testator says it shall benefit his *trust estate*.

In the Courts below the life tenants argued that the rule of construction that a testator intends to favor his wife and children in preference to other objects of his bounty, should be applied. The meaning of the will is clear on this point also; the will says:

"And I direct my said Trustee or his successor in the event of the death of any of my children born of the body of my said wife Mary Ellen to pay the share or portion of the income belonging to such child to the heirs that may survive such child dying."

Testator does not say the share of income formerly belonging to one of his deceased children shall be divided among his surviving children. Here is a clear

expression of an intention not to favor the children in preference to other objects of his bounty.

Modern American decisions, while taking note of ancient English Rules, have been very cautious in applying them and have repeatedly held that the test, of whether they are applicable or not, depends upon whether they would give a fair interpretation of the will in each case, and the Court below actually said:

"When once you have arrived at the intention of the testator you must give effect to it notwithstanding the rule in Howe v. Earl of Dartmouth. Any other conclusion would be in conflict with our own decisions. Mercer v. Kirkpatrick, 22 Haw. 644; Fitchie v. Brown, 18 Haw. 52; Rooke v. Queen's Hospital, 12 Haw. 375."

Record 56-57.

And the intention of this will containing a discretion to carry on a business profitably given to trustees followed immediately by an express power of sale when in their discretion they think a sale would be beneficial and inure to the benefit of the estate, was (the court below decided) that the trustees might "never convert the property at all and whatever sums they received for the use of the head lease (meaning the rents) were income and the life tenants entitled to receive it", whatever the consequences to the estate which the testator was so solicitous about benefiting.

"It is of course a rule to which there can be no dissent that, in construing a will the dominant intention of the testator, as manifest in his will, must if lawful,

be given effect; *but the intention which controls is that which is positive and direct, not that which is merely negative or inferential."* (Bill vs. Payne, 62 Conn. 140, 25 Atl. 345).

"It is only where the terms of the will are ambiguous, and the intention left in doubt, that a resort may be had to adventitious circumstances to determine that intention. Such circumstances can never be invoked to create an ambiguity. . . . *The duty of the Court is ended when it has determined* by the well settled rules of interpretation *what the testator* ACTUALLY *intended by the language which he has used.* If that intention is valid, it must be carried out."

Peck vs. Peck (Wash.) 137 Pac. 137, 139.

See also:

Clow vs. Hosier, 258 Fed. 278;

Estate of Grannis, 142 Cal. 1, 6;

Wilson vs. Linder, (Idaho) 110 Pac. 274, 276.

In re McDougall (N. Y.) 35 N. E. 961. Testator gave "all the rest, residue, and remainder of my estate, both real and personal" to his wife "to be used and enjoyed by her during the term of her natural life" or widowhood, and then to be divided equally between his mother and brother. The estate was converted into cash and realized $6000.00 net, and the widow claimed possession of the fund. The Court said:

"Because the testator says that he leaves the 'rest and residue' of his estate to his wife 'to be used and enjoyed' by her during her life or widowhood, such expression, in the opinion of the Courts below necessarily requires that she shall have the possession of the

legacy so as to use and enjoy it. On the contrary, we think the testator meant to give the widow nothing but an estate for her life or widowhood, terminable at the happening of either event, and that the remaindermen were entitled to receive at such time the whole corpus of the estate.—By the use of the language which follows the expression, the intention of the testator is made manifest, and the widow thereby takes but an estate terminable at her death or remarriage, and without power to expend any portion of the corpus for any purpose whatever."

Miller v. Williamson 5 Md. 219 at 235 referring with approval to Evans v. Inglehart (Md.) 6 Gill & Johns 196 said:

"Speaking of the duties of the executor, the Court says: 'If the surplus or residue thus bequeathed consists of *money* or property, *whose use is the conversion into money,* and which it could not for that reason be intended should be specifically enjoyed nor consumed in the use, but be by the executor converted into money, for the benefit of the estate; as for example, a quantity of merchandise, a crop of tobacco, or the like, an investment thereof must be made by the executor, in some safe and productive fund,—so as to secure the dividends, interest or income, to the legatee for life, and the principal after his death to the legatee in remainder.' "

(The italics are not ours but are in the report of the case.)

In Hawthorn v. Beckwith (Va.) 17 S. E. 241 at 243:

"But in regard to money—the rule is different. In that case the legatee for life is not entitled to the possession of the corpus, but only to the profits, and it is the duty of the executor to invest the fund, and hold it in trust until the termination of the life estate—'I take it', said Chief Justice Shaw in Field v. Hitchcock, 17 Pick 182, 'that nothing is now better settled than that such a gift of the interest only, and if no trustee is specifically named, it is the duty of the executor to invest the money and pay the interest only to the person entitled for life, and preserve the principal for him who is entitled to take afterwards'—So that, in electing to take the fund in the present case, as the life tenants did, they took it, not as trustees, but as borrowers."

The Court below relied upon the case of Kinmonth vs. Brigham (Mass.) 5 Allen 270 (record 77-78) in apportioning the Ookala rents between capital and income. That case involved the point on which the Supreme Court decided against appellants, as to the Mokuleia leasehold as indicated above. It discusses the English rules of construction above mentioned and in effect declines to follow them to this extent—the will gave the trustees a *discretion* to convert an unauthorized investment, the Court held this was not sufficient indication of intention to entitle the life tenant to enjoy the investment "in specie" or to receive as income all it produced if the trustees elected not to convert.

In that case the will gave the residue of testator's estate to trustees in trust to pay the income as therein provided with remainder over. Testator died Febru-

ary 22, 1860; a part of his estate was his interest in a limited partnership formed September 4, 1858, to continue for four years, to which he had contributed $50,000.00 and from which he was entitled to half the profits semi-annually. It was provided in the partnership agreement that in case of the death of either of the general partners within two years, the partnership should continue to the time of the next semi-annual accounting and the testator and his representatives should then have the right to take the property and business.

The will contained this provision to which we call the Court's particular attention:

"Eighth. And whereas by the latter part of the eleventh article of the contract between myself and partners, provision is made for the death of either of the general partners; now, in such event, my direction is, that my executors shall not avail themselves of that provision, unless they see fit."

The trustees did not avail themselves of the right to convert the investment in the partnership at testator's death but allowed the same to continue until the partnership expired Sepember 4, 1862. They received in that time $108,558.44 in profits as well as the return of the $50,000.00 invested capital. The life tenant claimed that the sum of $108,558.44 was income. The Court said, p. 276:

"The English rule is perfectly well settled that where the residue of personal property is left without specific description, and is given in succession to a tenant for life and remainderman, it shall be invested

in a permanent fund, so that the successive takers shall enjoy it in the same condition, and with the same productive capacity. The reason for the rule is the obvious and just consideration, that the intention of the testator is expressly declared to give the enjoyment of the same fund to these successive takers; and that this can only be done by fixing the value of the fund at the time when the right of the first taker to its use commences. The leading case is Howe vs. Dartmouth, 7 Ves. 137. This was followed by Ferns vs. Young, 9 Ves. 549, where the doctrine was applied to the case of money invested in a partnership at the death of testator. Many of the subsequent cases are collected and reviewed in 2 White & Tudor's, Lead. Cas. in Equity (Amer. Ed.) 278 et seq., and in the Notes to Howe vs. Dartmouth; and these with others have been carefully presented in the argument to this cause.

"In the application of this rule, the English courts of chancery, by a long course of decisions, have determined that an investment in the three per cents. is to be generally regarded as the only investment which will be sanctioned or directed by the Court as safe and prudent; though, in a few cases, a reference has been made to a Master to find whether an existing security at a higher rate of interest is not absolutely safe and more beneficial to all parties. Caldecott vs. Caldecott, 1 Y & Coll. 312, 737.

"But where property is specifically bequeathed, or where the intention can be gathered from the whole will that it should be enjoyed 'in specie' the rule does not apply.

"And the rule itself, so far as it requires an investment in public securities has never been adopted in this commonwealth. As was said by Chief Justice Shaw in Lovell vs. Minot, 20 Pick. 119 'There are no public securities in this country which would answer these requisites of an English court of equity'. The only rule which has been recognized by this court as obligatory upon a trustee in making investments is, that he shall act with good faith, and in the exercise of a sound discretion.

* * *

"But although in this commonwealth there are no investments regarded as so absolutely secure as to make a choice of them obligatory upon trustees and in all cases considerable latitude has been allowed, *yet it has never been held that trustees for successive takers were at liberty to disregard the security of the capital in order to increase the income.* Nor where property is of a wasting nature is an investment in it consistent with their duty, in the absence of specific directions in the creation of the trust. They are equally bound to preserve the capital of the fund for the benefit of remainderman and to secure the usual rate of income upon safe investments for the tenants for life; and to use a sound discretion in reference to each of these objects. If there is no specific direction and they are charged merely with a general duty to invest they cannot postpone the yielding of income for the increase of capital nor select a wasting or hazardous investment for the sake of greater present profit. *And the rule is the same in regard to property which comes to the*

trustees from the testator and not specifically bequeathed, as it is in regard to making new investments. If the investment is not such as this Court would sustain them in making, it should not be allowed to continue but should be converted. *Its value as a fund should be ascertained* as of a time when the enjoyment of the income of it is to commence; *and the fund treated as if it had been at that time converted into such an investment* as the Court would sanction. In determining this value it is not always practical to settle it with exactness, until the conversion is actually made; especially in cases where the capital is more or less at risk. The most just rule seems to be where reasonable care and prudence have been used by the trustees in making the conversion, *to treat the whole sums received from time to time, until converted, as parts of the estate;* and to find what sum at the time to which the conversion has reference would be equivalent to the amount actually received, at the time it was received; and to treat that sum as capital and the remainder as income. . . . . If the property were embarked in a commercial adventure, or were in the shape of a bottomry bond, or other hazardous condition, the trustees would be required to use suitable skill and caution in collecting whatever could be obtained from it, and the value of whatever was or ought to have been realized from it would be fixed as of the time of the testator's death, and treated as capital. And on the other hand, where the property is of a wasting nature, as terminable annuities, *leases,* or the like, the value of the whole investment at the testator's death should be

ascertained, and what should be computed as income be computed on that basis.

"In applying the principles which we have stated to the case at bar . . . . . *we are of opinion that there is nothing in the will which indicates an intention that she should enjoy the income of any particular property which the testator possessed 'in specie', but the whole residue was to be alike subject to investment by the trustees. The reference to the special partnership is only in connection with instructions to the executors as to their duty in a special contingency.*"

Kinmonth v. Brigham "supra"

"In re Hart's Estate 203 Pa. 480, 53 Atl. 364, the power was to invest in such securities *'as may in their judgment be best'*. In speaking of this broad power conferred upon the trustee, the Court said: 'His obvious duty was to preserve the principal by reasonably safe investments, and to pay such income as was earned from such investments to those entitled thereto. He was not to increase the income by any sort of supposed largely remunerative investments which might endanger the principal'".

Pabst vs. Goodrich, (Wis.) 113 N. W. 398, 407.

In *Ott v. Tawkesbury* 75 N. J. Eq. 4 the cases are fully discussed. The will after creating a trust provided:

"Sixth. I desire that my wife shall out of my personal estate make such gifts to my friends Howard W. Hayes, my long and faithful partner, Simon S. Ott, my uncle Col. A. S. Johnson and his wife, L. A. John-

son, (which I suggest in their case shall be money) as they may desire and my executors may approve.

"Seventh: I authorize my executors to sell and dispose of any or all of my personal property at public or private sale *at their discretion* and to invest the proceeds thereof whenever in their judgment such course shall be necessary or advisable for the carrying out of any of the provisions of this will. I also empower them to sell and dispose of any or all of my real estate at public or private sale at their discretion."

After stating the general rule of Howe v. Dartmouth, the Court said:

"It is claimed on behalf of the life tenant that the tendency of the Courts, as shown by the later cases, has been to allow small indications of intention as sufficient to prevent the application of the rule". (Cities authority) "But in a still later case Macdonald v. Irvine (1877) 8 Ch. Div. 101 where the general rule and the effect of these cases was considered, it was concluded by the Court of appeal that it was altogether a question of a fair and reasonable construction of the will. . . . This is the principle to be applied here and the test being, as I think it should be, whether the will, fairly construed, indicates such an intention that the property in question is specifically bequeathed and to be enjoyed 'in specie' . . . None of the personal property is expressly bequeathed to the life tenant by description or 'in specie', and it is claimed that the direction in the sixth clause that his wife shall out of his personal estate make gifts to his two executors and others (preferably

money to these two) is a specific gift by implication, because it necessarily contemplates the possession of the personal property by the wife in order that she may make the gifts." The Court held with reason that was not the intention of the will and said: "For it must be further observed as bearing on the question of the testator's intention that the property is to be enjoyed by the widow 'in specie', and not be converted, that we have in this will a case in which the general rule as to the testator's intention of conversion, derived from the formal terms of the bequest itself, is fortified by other clauses indicating specially an intention that the executors shall convert all of the estate and hold the proceeds, and that pending the conversion, the tenant for life shall not enjoy the possession of the property 'in specie', as it existed at testator's death. These clauses are those which expressly authorize the sale of any or all of the personal property at public or private sale, and the investment of the proceeds, to carry out the provisions of the will, the express authority to sell the real estate, and the express direction that the management of the real estate in which Mr. Ott is interested with him shall continue with him, thus excluding the tenant for life from any enjoyment 'in specie' of these lands or of their proceeds of sale. These are express special indications appearing by the will that after the payment of debts and the delivery to the widow of the four gifts selected by her and approved by the executors, it is the testator's intention that the whole estate, real and personal, shall be converted by the executors and invested by

them for the purpose of paying the income to the wife. Confirming as they do, the application of the general rule as to conversion, which arises from the form of the bequest itself (a general bequest to persons taking in succession the same property), I must hold that the tenant for life is not entitled to demand of the executors the payment of the principal fund."

The construction asked for by the life tenants and the trustees would, in this case, if adopted, not only deprive the grandchildren of the estate bequeathed to them, but would also make it impossible for the trustees to carry out the trust for the maintenance and support of the life tenants after the lease expired.

None of the cases relied on by Appellees in the court below help to explain what the trustees would do if the consequences which they contend arise from a discretionary power of sale, viz., a right on the part of the trustees to retain investments and a right on the part of the life tenants to receive all of the proceeds of the property, resulted in the trustees being unable after 1934 to provide support and maintenance for the children which surely was one of the main objects of the creation of the trust and was to last as long as any of them lived. The appellees contend that there is a *presumed* intention in this will which may defeat not only the definite gift of the trust estate with all additions or increase to the testator's grandchildren, but also the definite gift of maintenance and support to the testator's own children during their lives.

METHOD OF DETERMINING CORPUS

The courts below held that $20,668.35 was the corpus or capital value of the Ookala leasehold to be set aside by the trustees out of the net rents amounting to $34,329.34, and said:

"In order to arrive at that value each installment of rent received by the trustees from said leasehold was considered to be part income and part capital. To determine what portion of each installment of rent constituted capital calculations were made by the actuary to ascertain what sum put out at six per cent. interest with annual rests on the date of testator's death would amount to each installment actually received at the time it was received. Each installment was figured separately and the sum of amounts thus ascertained equals the value found by the circuit judge." (Record 75.)

We contended in the court below (Record 75-76) and contend here that four courses were open to the trustees at the beginning of the trust, as follows:

1st. The trustees could have valued the leasehold at the inception of the trust and paid to testator's children maintenance and support out of an amount equal to six per cent (6%) of such value; or

2nd. They could have sold the leasehold, invested the proceeds and supported and maintained testator's children out of the income thereof; or.

3rd. They could have invested the rents as received and supported and maintained testator's children out of the income therefrom; or

4th. They might (by analogy to a direct gift of money for life) have paid the rents as received to testator's children upon receiving reasonable security to preserve the fund for his grandchildren.

What the trustees did was to pay over the rents to the children to use as they thought fit, so that the mehod that they adoped was the fourth, except that the trustees gave testator's children the unrestricted use of the money without any security, which neglect to take security was a concession to testator's children of which they cannot complain.

AUTHORITY FOR THE FIRST METHOD INDICATED

"It follows that as to property, which at the testator's death is invested upon permanent government or even real securities, the legatee for life is entitled to the actual income . . .

"But as to property which has a temporary duration only, as leaseholds or annuities for lives or years, the actual income of which, it is obvious, partakes to some extent of the nature of capital, the same rule could not be justly applied, as it would evidently have the effect of conferring an undue advantage on the person entitled for life, at the expense of the ulterior taker.

"The fair course, and at the present day the settled rule, in such cases, seems to be to carry to account, as capital, the income accruing from the time of the testator's decease; and in lieu of such income, to pay to the legatee for life from that period, a sum equal

to the dividends which the produce of the sale would have yielded if invested. . . ."

1 Jarman on Wills (5th Ed.) p. 619 bottom numbers.

"Where the property is of a wasting nature as terminable annuities, leases or the likes the value of the whole investment at the testator's death should be ascertained and what should be regarded as income be computed on that basis."

Kinmonth vs. Brigham, "supra".

The value of a lease at testator's death is ascertained not for determining the amount of the corpus, but for determining what amount of income shall be paid to the life tenants.

In the Kinmonth case the Court held that even the *profits* after testator's death were not to be treated exclusively as *income*.

In our case, the life tenants compare the Ookala "rents" to the "profits" in the Kinmonth case. The comparison is improper because the "rents" represent the "capital", to wit:— the lease itself, and should be compared to the $50,000.00 invested capital in the Kinmonth case.

In these cases the problem is what should the life tenants receive. Courts are usually concerned about the estate. The property belongs to the remaindermen, subject to the right of the life tenants to receive the income. If the property had been sold at the time of the testator's death for the value put upon it as of that date, all the testator's children would have been entitled to would be maintenance and support

(including education of the daughters) out of the income of the proceeds.

AUTHORITY FOR THE SECOND METHOD INDICATED

"The case of Mills v. Mills (7 Sim. 501) falls within the present sub-division of our subject. There the Testator devised and bequeathed all his real and personal estate to trustees in trust to pay *the proceeds* to his daughter for life, and after her death to her children, and in default of children, over. Part of the Testator's personal estate consisted of leaseholds . . . Sir L. Shadwell, V. C., . . . held that the leaseholds . . . should be sold . . . His Honor further held that the tenant for life must refund what she had received, more than she would have received if the leaseholds and the stock had been sold, and the proceeds invested in the three 'per cents.' "

2 Roper on Legacies (2nd Am. Ed.) 1329.

AUTHORITY FOR THE THIRD METHOD INDICATED

In Crawley v. Crawley, 7 Sim. 427, 58, Eng. Reports 901, it was held where an annuity for a term of years forms part of the residue, the executors, until they can sell it, must invest the payments, and the interest of the investments belongs to the tenant for life of the residue.

In Tucker vs. Boswell, 5 Beav. 607; 49 Eng. Rep. 713; £200 (that is, the difference between £400 and

£200) per annum income of the estate given to testator's widow if she should regain sanity, was held, on her not regaining sanity, to be corpus and not income for the tenant for life of the residuary estate.

AUTHORITY FOR THE FOURTH METHOD INDICATED

"It has often been held that money may be the subject of an executory devise, but where the use of money is given by will to a person for life, and then over, such person is entitled only to the interest on such money, and not to the principal sum. A sum of money devised to one for life, with remainder to another, may be of great use to the first taker; he may put it to interest or invest it in goods or land, and thus make a profit. All that is required is that on his death his executors pay the principal to the remaindermen. Money has this peculiar advantage over other chattels, that the use of it occasions neither loss nor injury, and from time it suffers no decay. The executors of the first taker are not bound to pay over the identical pieces of metal which their testator received, but the like value in lawful money of the county. So the rents and profits as well as the estate itself may be given by way of executionary devise."

11 R. C. L. page 474, sec. 11.

"If a fund is handed over to the tenant for life instead of paying him the income therefrom, he may invest the fund, and the profits from such investment become his exclusive property, the remaindermen being entitled only to a return of the original

sum. He may use the fund and make all the profit on it he can with due regard to its safety and protection."

21 C. J. 1041 sec. 246.

"The executor or trustee may, instead of selling the property, intrust it to the life tenant upon his giving adequate security for the preservation thereof, in such cases as security is necessary . . . and a tenant for life who is willing to give adequate security may demand possession of the property instead of having it sold. One to whom the net estate of a decedent has been bequeathed for life is entitled to the possession and control and management of the *estate, consisting of money* upon giving proper and adequate security."

21 C. J. 1040.

The trustees contend that they paid the rents "in toto" to testator's children *as income.*

The law wisely presumes that persons intend the consequences of their acts.

Therefore, the trustees by paying the rents to the life tenants *elected by their conduct* which course to follow at the begnning of the trust. Life tenants were parties to and acquiesced in the course adopted. The trustees must be presumed to have known what their duties were and acted accordingly. If they did not know, the Courts were open to them then as they were when they filed their bill for instructions. Where their conduct is capable of a construction favorable to the terms of the will and to their powers and duties, that construction must be attributed to it. When tes-

tator's children have taken the advantages of the use of the money, it being much more favorable than the limited returns a trustee can get by investing it, they cannot say after they have enjoyed all of the advantages of their conduct, that another course would be more advantageous to them today. They and the trustees are estopped by their conduct.

Let us summarize the above:

1. The law says that you may give the tenants for life the use of the corpus, instead of investing it and paying them the income;

2. The trustees did give the testator's children the use of the corpus;

3. But the trustees and the children say that they thought it was income that belonged to the testator's children.

The answer is: "Ignorania legis non excusat."

Election is the right to choose between different courses. It is based upon the rule that a party cannot in his dealings occupy inconsistent positions. For instance, where a man rescinds a contract, the law does not permit him later to make use of the contract as subsisting for the purpose of claiming damages, or for the purpose of recovery thereon.

In Clausen v. Head, 110 Wis. 405, 411, it is said:

"The doctrine that intent to make a choice between inconsistent remedies is essential to a choice, and that absence of such intent will relieve one from the effect of the rule we have discussed, applies only where action in the first instance was taken in *ignorance of the facts.* * * * Where knowledge of the *fact*

exists, intent is conclusively presumed as a matter of law; and such presumption cannot be affected by any declaration or reservation of a right to take a different and inconsistent course at a subsequent time."

All of the facts of the case were as well known to the parties when they adopted the course they followed as they are today.

Our contentions as to the method of determining the corpus of the rents apply to the Mokuleia rents equally with the Ookala rents.

SOME OF LIFE TENANTS' CONTENTIONS.

As we may not have an opportunity of replying to their brief, we wish to deal now with two contentions that it has been suggested life tenants will make:

First: That the Supreme Court erred in holding that the rents or part of them from the Ookala leasehold were corpus; and

Second: That this appeal does not bring up for review the first decision of the Supreme Court that no part of the Mokuleia rents are corpus.

As to the first contention—the appellees did not appeal from the decree of the Supreme Court and have not taken any appeals at all in the case.

"We think it is elementary that where a party to a suit does not appeal from the decree entered therein he must be held to acquiesce in it and cannot be permitted to ride into an appellate court upon the appeal of some other party to the suit."

Castle vs. Irwin, 25 Haw. 786, 788.

"We are of opinion that counsel for the executors had no right to appear and be heard against the decree, no appeal having been taken from it by his clients."

Fitchie vs. Brown (Hawaii) 211 U. S. 321, 329.

As to the grounds for the life tenants' first contention, they seem to be these:

(a) That the use of the words "rents income issued and profits" in the will meant the "rents" of the leaseholds. We have sufficiently discussed that question above.

(b) The testator made his will three days before he died, at a time when he was sick and knew he was dying, and that he knew then he had no real estate and made his will with the intention that it should apply to the leaseholds and personal property only.

The evidence that the testator knew he was dying when he made his will was given at the hearing of the accounting in the Circuit Court after the first appeal had been decided, over the appellants' objections on the grounds that such evidence was outside of the scope of the hearing on the accounting and that it was incompetent, irrevelant and immaterial (Record 137-140, 145-146.) Such evidence if competent would tend to alter the intention expressed in the will. The Circuit Judge, in his decision, held that the evidence referred to did not affect the question (Record 70-71) and none of the appellees appealed.

"To allow the legal construction of the terms of a will, executed and attested as required by law, to be affected by testimony of testator's state of health at

the time of publishing his will, or to his length of life afterwards, would be open in the highest degree to the confusion and uncertainty resulting from permitting the meaning of written instruments to be altered by parol evidence."

Barber vs. Pittsburgh, etc. Ry. 166 U. S. 83, 109.

Evidence that a will made two days before testator's death and that he then had no personal property is not admissable to show his intention.

McGough vs. Hughes, (R. L.) 30 Atl. 851.

As to the second contention—the first decision of the Supreme Court partly reversed and partly affirmed the decree of the Circuit Judge and remanded the case for further proceedings (Record 63, 66-68). Further proceedings were had and a decree entered (Record 72-73), and appallants again appealed to the Supreme Court which entered a decree on March 8, 1922 (Record 85). This was the first decree entered in the Supreme Court and the first opportunity appellants had of appealing to this Court.

"Writs of error and appeals from the final judgments and decrees of the Supreme Courts of the Territory of Hawaii * * * wherein the amount involved * * * may be taken and prosecuted in the Circuit Court of Appeals."

38 Stat. L. 804; 6 Fed. Stat. Ann. 145.

In Rumsey vs. New York Life, 267 Fed. 554, this Court held that in Hawaii an order by the Supreme Court remanding a case to the Court below for further action is not final so as to be appealable to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated April 23rd, 1923.

Respectfully submitted,

HENRY HOLMES,
H. EDMONDSON,
Attorneys for Appellants.

No. 3989

United States
Circuit Court of Appeals
For the Ninth Circuit.

EVA GAY, et al, Minors, by Guardian ad Litem,
Appellants,

vs.

H. FOCKE, et al,
Appellees.

Brief for Life Tenants, Appellees

Upon Appeal from the Supreme Court for the Territory of Hawaii.

W. O. SMITH,
L. J. WARREN,
Attorneys for Life Tenants, Appellees.

Filed this ..... day of May, 1923.
F. D. MONCKTON, Clerk.

By.....Deputy Clerk.

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THE LAW

THE MOKULEIA LEASE AND RENTS

APPORTIONMENT OF RENTS

No. 3989

United States
Circuit Court of Appeals
For the Ninth Circuit.

EVA GAY, a Minor, BEATRICE GAY, a Minor, SONNY JAMES MOKULEIA GAY, a Minor, MICHAEL VANATTA K. GAY, a Minor, LLEWELLYN NAPELA GAY, a Minor, ALBERT GAY HARRIS, a Minor, WALTER WILLIAM HOLT, a Minor, ALICE K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor, by HARRY EDMONDSON, Their Guardian ad Litem,

Appellants,

vs.

H. FOCKE and H. M. von Holt, Trustees Under the Will of the Estate of JAMES GAY, Deceased, and LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY, ALICE MARY K. RICHARDSON, HELEN FANNY GAY and FRIDA GAY,

Appellees.

BRIEF FOR LIFE TENANTS, APPELLEES.

STATEMENT OF THE CASE.

The appellants' statement of the case, as far as it appears on pages 1 to 3 of their brief, is substantially correct, although colored throughout with such modes of expression as best accommodate the contentions made; but the Court will of course gain its own conception of the facts and their essential bearing on the issues as consideration proceeds. The recitals on page 4 of appellants' brief as to the ground covered by the so-called "final" decree, and as to the issues brought up by this appeal, and as to how far the appellees may be heard thereon, are not in accord with our understanding of them. The decree last entered by the Supreme Court, from which this appeal has been taken, was complete in itself, as to the only issue therein dealt with by the court, which was that of whether or not the lower court had correctly apportioned between corpus and income the rents which had been collected by the trustees under the old expired Ookala lease.

The appellants are seeking to have this court review not only the issues which pertain to the so-called "Ookala lease", which, alone was the subject of the decree appealed from, but also those heretofore involved as to the "Mokuleia lease" with respect to which no appeal has been taken. It is true that appellees contend that this appeal brings up the issues as to the "Mokuleia lease", but we think that the record will not support them.

It is our contention that this appeal brings up nothing as to any earlier decision of the Supreme Court as

to the Mokuleia lease, and that the Mokuleia lease and rents are not involved.

It is novel, moreover, to have it assumed that on this appeal the Court will look only to the welfare of the appellants, the testator's grandchildren, although appellants seek thereby to take away what the decree has conceded to the life tenants and at the same time to ask to retain all *they* gained by the decree appealed from, even while they attack its very foundation as wrong in law and in principle. It is novel, also, to have the appellants contend that they may bring up for review the former decision as to the Mokuleia lease which was in favor of the life tenants, and here seek to have it reversed, and yet contend that this appeal brings up "both decisions" of the court "so far as they affect the grandchildren only", because the life tenants have not appealed from the decree of March 8, 1922, as to the Ookala rents.

The Errors Assigned.

The errors assigned by appellants rest mainly upon the theory that after the testator's death the entire rents accruing from the subleases became principal in the trustees' hands, no part thereof being "income" for his family, but all to be held and invested as corpus, and only the income therefrom used for his wife and children. They are divisible practically into two groups, as the first five relate only to the Mokuleia lease and the next three to the Ookala lease. Except as to error 7 there is no substantial difference between the groups, and as a whole they merely indicate different methods

conceived by the appellants for arriving at the same result. There is also more or less duplication within the groups because the same legal propositions are stated both in direct and converse form. Error 9 is only another general method advanced as a legal theory to the same end. Error 7 presents the separate question of the correctness of the method used to apportion the Ookala rents between corpus and income. Errors 10 to 16, inclusive, are merely general. All of the errors will hereafter be particularly referred to, but we will first discuss the broad propositions which we think should dispose of practically all of them collectively.

Preliminarily, we submit that as this appeal is only and specifically (Tr. 87) from the Supreme Court's decree of March 8, 1922 (see Tr. p. 85), and that decree was simply one of affirmation of a certain decree of the circuit court which dealt solely with the amount of rents received from the Ookala lease and their apportionment between corpus and income, there can be no review on this appeal of any matters foreign to that decree,—i.e.—the Mokuleia lease and rents therefrom.

There had been a former decision and a former decree of the circuit court as to the Mokuleia lease, made on the first hearing of the case when the Ookala lease was treated as a dead issue. (Tr. 40-43). The appellants appealed to the Supreme Court from that decree, and the appellate court sustained the lower court's decree as to the Mokuleia lease, but resuscitated the Ookala lease and held it should have been converted, and, in consequence, that the rents received on that old lease

(long before expired) should be apportioned between corpus and income and the corpus restored for the remaindermen. As there were not sufficient facts upon which the Supreme Court could enter a decree in this regard, the court proposed to remand the case for an accounting respecting the Ookala rents unless the parties should agree thereon. They did not so agree. The guardian ad litem of the minor respondents, appealing, asked for a rehearing, contending that the Supreme Court should instruct the trustees as to the method of apportionment, or make its own decree thereon, asserting that the record contained sufficient facts therefor. The Supreme Court adhered to its decision saying they thought it "only fair to all parties that the cause be remanded to the circuit judge where a full hearing can be had and the amount for which the trustees must account be properly ascertained" (Tr. 65). It is obvious that the "further proceedings" to be had "not inconsistent with" their opinion of April 5, had reference only to the Ookala lease,—a single specific matter, not the subject of the decree appealed from. Their action was on their own motion,—not that of the appellants, and only, as they say, because the trustees had asked for instructions and that all proper accounts be taken, and because they thought the Ookala matter should also be settled in the same action (Tr. 63).

The circuit judge proceeded to go into the matter of the Ookala lease, as separately from the other hearing as though it were a new case altogether, and, having dealt solely with the Ookala rents, entered a decree

thereon which did not even allude to the Mokuleia lease or the former decree (Tr. 72). Nor did the circuit court's decision on which that decree was based deal with the Mokuleia lease in any way. It nowhere appears that the guardian ad litem objected to that course, or had no opportunity to object because a new decree was made instead of the former decree having been modified. Appellants again appealed, and although in the decision of the Supreme Court on that appeal it is said that the "appellants complain because the circuit judge entered a new decree instead of modifying the former decree (Tr. 75), this was deemed "at most an immaterial departure" from the remanding order,—clearly showing that they regarded that order as having been properly complied with.

The point of *what was presented* and urged by the appellants on their appeal from the second decree of the circuit court, is clearly shown by the following language from the supreme court's decision reviewing that decree. After mentioning that the court below had adopted certain actuarial calculations to determine the amount which should be set aside out of the Ookala rents as corpus, the court said "The remaindermen being dissatisfied with the decree *in this respect* have again appealed to this court". The remaindermen had been contending that the Ookala rents were *all* corpus, in one way if not another, just as they now do. The decision of the Supreme Court shows no other thing dealt with. The Mokuleia lease is not even mentioned in this decision, and certainly not in the decree of March 8, 1922, now

appealed from to this Court. The matter which took more attention than even the Ookala rents was that of fees claimed by the guardian ad litem for services. That is, the case was not remanded for any rehearing on anything heard before. The Mokuleia issue had been settled. It remained so. And so the Supreme Court simply affirmed that second, new decree of the circuit court as to Ookala, its only subject. It does not refer to any former decision or any former decree. Nothing is imported into it, and it shows no implied connection with anything else.

There is nothing to show that the Supreme Court was asked to make any different decree. There is no assignment of error here that this decree appealed from did not cover the case, or failed to say anything about the Mokuleia lease or rents. The errors assigned as 1 to 5 do not refer to anything in the decree appealed from. Clearly this is so when errors 2 and 5 are seen to say that the court erred "in finding and holding" certain things as to the Mokuleia lease,—inasmuch as nothing is so found or held in the decision on which this decree was based, or in the decree itself.

In anticipation of our position in this matter, appellants say this decree was the first decree entered in the Supreme Court and the first opportunity they have had of appealing to this Court (brief p. 53), and cite Rumsey v. New York Life, 267 Fed. 554, as sustaining their position.

But our case is different. There a new decree had to be entered in displacement of the one appealed from.

Here the case went back for a supplemental matter, leaving Mokuleia undisturbed. The special thing was the ascertainment and apportionment of the Ookala rents, not dealt with at all by the decree appealed from. They were so far separate that a separate decree was entirely approved, showing that "modification" of the decree appealed from meant supplementing it.

But the decree of March 8, 1922 is what it is. It held nothing as to Mokuleia. If it were true that the first decision of the Supreme Court were not appealable, that fact cannot enlarge the later decree of March 8, 1922, to make it cover a matter it does not even purport to cover or affect. If the lower court should have taken its former decree as to Mokuleia and "modified" it,—nevertheless it did not. If the Supreme Court erred in not again remanding the case to have a "modified" decree entered by the lower court, or if it erred in not having itself entered a decree, to include the Mokuleia lease,—nevertheless it did neither, and such failure has not been assigned as error here.

There simply is no decree before this Court dealing with or affecting the Mokuleia leasehold, and we submit that the record shows an abandonment of that issue, and an acceptance of the former decision on it. If the limited scope of this decree had been a matter of oversight, or if any point about it had seriously been made, a petition for rehearing was open. It was eminently a subject for such a petition if it had been a live matter. It was allowed to stand. The decree cannot be enlarged now.

And while we shall in this case make references to the Mokuleia lease and its incidents, these will be for the purpose of showing its status and income-producing capacity as of the time when the testator made his will, and as showing that these matters were in his mind, and therefore that they are pertinent as an aid to the court in construing his intention when he made certain disposition of the "rents, income, issues and profits" of his "trust estate",—the questions being whether he meant rents from his leaseholds, and what property he had in mind as constituting his "trust estate".

The Claims of the Appellees.

(1) The testator, by his direction for the payment to his wife and children for their lives of all of "the rents income issues and profits arising from and out of my said estate", clearly had reference to his "said trust estate" as he then held it and as he understood it to be at the time, namely his two leaseholds of the lands at Mokuleia and Ookala,—because: —

(a) From all of the surrounding facts and circumstances at the time this will was made he clearly could never have contemplated anything but the continued holding of these leases by his trustees, as he had been holding them, and using the proceeds of the whole trust estate to maintain his wife and children, and he did not subordinate their welfare to that of his possible future grandchildren;

(b) He had himself made sub-leases and was treating the rents therefrom as income, and could not have expected his trustees to run his ranch without treating

them as income available for operating and living expenses in connection therewith;

(c) He was on his death bed and knew himself to be then dying, and so could not have had reference to "rents" to accrue from real estate he might thereafter acquire before his death.

(2) That evidence of these then existing conditions has not been offered to change or alter the written terms of the testator's will, but to aid in a construction of those provisions by construing the intent from the language used in the light of all the surrounding facts and circumstances under which he executed the will, where there is ambiguity or doubt as to what he did mean by the words used.

(3) That the special discretionary provisions as to continuation of the Mokuleia ranch business (involving, necessarily, a continued holding of that lease), also involved, by strong implication not anywhere negatived, that he assumed the trustees in so doing would also have the "rents income issues and profits" from the Ookala as well as the Mokuleia lease, upon which he had himself depended as a source of income and which he had used in his own business of operating the Mokuleia property and maintaining his family, and without which Ookala rents he could not have anticipated the trustees would be able to do the ultimate thing,—care for his wife and children.

(4) That even without the specially stated discretion given to the trustees to hold and operate the Mokuleia property, it is clear, considering the question of his in-

tent in the light of the surrounding facts and circumstances, that he did not expect or intend that the trustees should convert either of the leases, but rather showing his intention that they should hold them both, as he was holding them. If that is so, that intention is all-controlling, whereby *all* of the rents from the Ookala lease (and for the same reason all of those from Mokuleia) will hold their intended classification by the testator as "income" belonging to his children, and not to be accumulated for his grandchildren,—these minor respondents.

(5) That should it be deemed that this Court should also review the case as to Mokuleia, and hold against us on our contentions as to the testator's meaning in his use of the words "rents, income, issues and profits arising from and out of my said trust estate", then the special discretionary power given to the trustees to continue to hold and operate the Mokuleia property was itself sufficient to take that lease out of the rule of implied intent for conversion of wasting assets, and the ruling heretofore made to that effect as to the Mokuleia lease should not be disturbed.

(6) That if this court sustains the ruling, heretofore made that the Ookala lease *is* within the rule of Howe v. Dartmouth, and therefore should have been converted by the trustees on the testator's death, the decision now appealed from, as respects the rule adopted for the segregation of the Ookala rents into income and corpus, is correct, and the apportionment is correctly made.

We shall present the case for the life tenants upon

the assumption that if the testator intended that the rents from both his subleases should go to his own wife and children, then this court will not and cannot (merely because the life tenants have not appealed from the decree) let the remaindermen get what they are not entitled to in respect of either lease; and if this court must repudiate appellants' contention that these rents were to be retained as corpus,—at all,—then there will be no theory left by which the remaindermen may hold even the Ookala rents.

One of our main contentions being that as the testator knew he was dying when he made this will, and therefore made it, he had only his then estate in contemplation, from which he gave the "rents" to his own family, we feel that our case should be introduced by an outline of the proceedings as had from the first, so that our points will more readily be understood.

In August, 1919, the trustees under the will filed a petition in the circuit court asking to be instructed as to their duties in the execution of the trusts under the will, after they (one of them still being one of the original trustees named in the will) had continuously been acting along certain lines ever since the testator's death in 1893. The petition set forth, for the information of the court, the facts as to both leases, showing that the Ookala lease had long since expired but that the Mokuleia lease was still in force (See Tr. pp. 2-12).

The answer originally made by the guardian ad litem for the minor respondents, the remaindermen, does not appear, as it was subsequently displaced by an amended

answer, appearing on pages 24-28 of the Transcript, which, it will be noted, was given the date of January 23, 1920 (Tr. 28) although it was not served or filed until April 6, 1920 (Tr. 28 and 29), which was the same day as that on which the court's decree was dated and filed (Tr. 43), and four days after the court's decision was filed, April 2nd (Tr. 39-40). We note this particularly because it manifestly is an answer amended after the close of the trial to particularize and concisely express the remaindermen's claims, as though to conform to the proofs, and because of its bearing on the point we shall later emphasize that on the first hearing the case was in fact tried and submitted in the circuit court on the primary and single question of the duties of the trustees and rights of the parties as regards only the Mokuleia lease. The record is replete with proof of our position that on the first hearing the Mokuleia lease was regarded by the court and by the parties, early in the case, by a sort of tacit assumption, as the only live issue (the long expired Ookala lease being treated as a dead issue), upon the view of that court that the issue as to the Mokuleia lease would depend in any event upon a construction of the will as to the effect of the discretionary powers specially given the trustees with regard to the Mokuleia property. In consequence, the question of the effect of the word "rents" in the clause as to "rents issues income and profits" was discarded, and, with it, the incidental matter of producing evidence calculated to show fully the testator's meaning as to "rents" by reference to the facts and circumstances surrounding the execution of the will.

It is worthy of notice that according to the amended answer of the minor respondents "the Mokuleia leaseholds" constituted "the principal assets" of the "trust estate". It is obvious that the prayer and answer are upon the assumption that the Mokuleia lease was the one big thing to be dealt with. As the case opened, data was presented as to both leases, and the Ookala rents were shown to some extent, but were not followed up by either side, so that the Supreme Court was later unable to make a decree as to the Ookala lease; and when the Ookala lease fell out of the case the contest centered on the still existing Mokuleia lease and subleases as the subject of the case with which the court would assume to deal. It is true that the question of the meaning of the word "rents" as used with respect to the estate was raised on the first hearing, but it didn't hold attention, and when on the appeal from the first decision this point was argued on both sides, it was as a secondary or sustaining factor apart from the discretionary provision of the will, and it was, in consequence, argued without the foundation of a proper showing of all the facts and circumstances which surrounded the testator when he directed the payment of the "rents" to his family out of his "estate". The real importance of these words, "rents" and "estate", as a deciding factor of the case, as to both leases, was not appreciated until the Supreme Court made a distinction between the two leases on account of the discretionary factor as to one of them. Consequently, after the Supreme Court had held in effect that there was noth-

ing to show that the testator had his leaseholds in mind as the subject of the word "rents", the life tenants, on the ensuing hearing before the circuit court, offered further evidence on that issue, in order that the point might be reviewed in the light of the *real* surrounding facts and circumstances. Of course it is the view of the appellants that the trial court had no right to receive any evidence of that kind. Our answer is that we assumed the court would recognize, as would the Supreme Court thereafter, that we had not had a real hearing on that issue, and that, in a case in equity, we were not yet out of court upon it. The Supreme Court in fact later simply ignored the new evidence. And although the circuit court received the evidence so offered, it obviously considered itself bound by the decision of the Supreme Court as to the effect of the word "rents", and so held that it "would not affect the question of the duty of the trustees to have converted the Ookala lease *as has now been directed* by the Supreme Court". (Tr. 71). Nevertheless, the circuit court's manner of reception of it abundantly sustains our position here. See the full verbatim report on pages 137-138 of the Transcript.

In his first decision the trial judge had simply said, as to the Ookala lease and any rents under it:

> "At the time of filing the petition herein this lease had expired and the estate of James Gay no longer had any interest therein and it need not further be considered" (Tr. 31).

The most casual reading of the first decision of the

trial court will show that it was rendered from the standpoint only of the Mokuleia lease, and the provisions of the will that the trustees should go on with the testator's business on the Mokuleia premises were taken as controlling, and that the court held that the discretion so given showed that no conversion was intended,— from all of which that court sustained the course the trustees had been pursuing in distributing all of the rents from the subleases to the life tenants (Tr. 37-39).

The decree of the circuit court, based on this decision, does not even allude to the Ookala lease (Tr. 41-43), showing how completely it had dropped out of the case.

For the reasons indicated, the argument to the Supreme Court as to the testator's intent as manifested by the use of the word "rents" was based upon evidence which did not include the proof later adduced that the testator in fact knew he was dying when he made his will, and, therefore, that he only had his leaseholds in mind, and the rents from the subleases, when he referred to "rents" from his "said estate", and that he could not, while contemplating his imminent death, have used these words with reference to any lands in fee he might acquire after making the will and before death. The Supreme Court, in its first decision, after discussing our argument as to the meaning of the word "rents", recognized that it was not our main contention, saying:

> "But the life tenants do not rely alone or principally upon the use of the word "rents" to sup-

port their contention. Their main argument is based upon that portion of the will" (giving discretion as to sale of the Mokuleia property). (Tr. 61).

On the first appeal the Supreme Court held that the rule enunciated in the case of Howe v. Dartmouth (7 Ves. 137), as to a presumed intent for conversion, does not apply to the Mokuleia lease because of the discretionary powers given to the trustees as to that property, but then went further, taking up the Ookala lease, and held that the discretionary right of retention did not extend to the Ookala lease, and therefore affirmed the lower court's decision as to the Mokuleia lease, but sent the case back to the circuit court with instructions to modify the decree appealed from and take an accounting with a view to requiring "the restoration of the corpus of the estate represented by the Ookala lease" (Tr. 63).

The circuit court then proceeded to take evidence as to the net rents derived from the Ookala lease, as appears in the agreed statement of the evidence (Tr. pp. 134-136).

Incidentally, we here mention that the agreed statement of the evidence (appearing in Transcript pages 120-146) includes the evidence taken at both the first and second hearings before the circuit court.

In view of the decision of the Supreme Court, however, the circuit court held on the second hearing that the trustees should set apart "out of the accumulated income now in their hands" the sum of $20,668.35 as capital for the remaindermen (Tr. 71). The clause

just quoted, as to accumulated income, is explained by the fact that pending a decision the trustees were withholding income from the life tenants.

ARGUMENT.

We shall assume, at the outset, that whatever the arguments may be as to the law, the application of it will turn upon the facts of the case which show the intent of the testator, which must be gathered from the language used, supplemented, in this case, by a proper consideration of the facts and circumstances manifestly within the testator's knowledge when the will was made, such as the quantity and condition of his estate, the objects of his bounty and their ordinary requirements in his contemplation, and any other relevant matters which it will be assumed would show his own understanding of what he wanted to accomplish and the means he was providing for his trustees to do it. Once the intent is clear, all rules for legal presumptions as to intent will have no application.

As to the facts and circumstances surrounding the testator at the time he executed the will:

These are relied upon by the appellees, not to call for any change or alteration of the written terms of the will, but as an aid in arriving at the intention of the testator, from the language used in the will, when that language is open to ambiguity.

It seems remarkable that from this will the appellants have built up an argument that throws the testator's wife and children into the discard; treating

them as mere incidents,—mere incumbrances,—as respects the great lode star of his mind,—the welfare of his future unborn possibilities in the way of grandchildren, who are to be provided for regardless of everything else.

His trustees supposed the testator meant something else,—his own wife having been one of them, and his old friend and business agent, Herman Focke, the other.

We characterize it all as a misconceived idea of what would naturally actuate a normal person having a natural regard for his wife and his own children, several of them almost babies; it is a specious argument in favor of an unnatural intention for a natural one; and a play upon words as against the testator's manifest expectations.

And, if all that can be built up from the words in the will, surely we may invite the court to consider something besides the words in the will, if the words used are of doubtful meaning to this court, that will help the court decide what the testator did mean. The rule against resort to extraneous matters does not apply where there is ambiguity.

We have language in this will which will have to be held ambiguous if it cannot be taken as meaning clearly that the testator had reference to his leaseholds only, and not to any possible future acquisitions of land, when he used the words "rents, income, issues and profits arising from and out of my said estate" as intended for his wife and children. It seems to us

that the language he has used, on which both sides here are founding irreconcilable contentions, does require construction in the light of the surrounding facts and circumstances.

Let us take his expressions just as they come in the will.

1. The first is the placing in trust of "all my estate real personal or mixed". To this initial use of them, —"all my estate" all the other references must be taken as made. What did he mean by "all my estate?"

2. Next, and so closely following as to be inseparable from "all my estate", he creates the trust "to pay the rents income issues and profits arising from and out of my said estate" to his wife for life, for her and his children. So far we can't get away from the absolute identity, in his mind, of the "estate" in paragraphs 1 and 2.

3. Next, the trust continues, that after the death of his wife, the same trustee (Focke) or his successor in "said trust", is "to pay the rents, income, issues, and profits arising from and out of said trust estate" one-half to his sons and one-half to his daughters for their support and maintenance. The only difference in language from that quoted in paragraph 2, consists in the insertion of the word "trust" so as to make the reference "said trust estate", which ties it absolutely to the same "estate", in his mind, as he had placed in trust by the disposing words. For all he could know when he made that will, many years might elapse before the death of his wife, when his second

reference to payment of "rents", etc., would be looked to as stating the duty of the trustees and indicating the "estate" then concerned. And, speaking of his estate as of that future time, he simply said "my said trust estate".

4. The next reference to his "estate" which, it is obvious, leads us further into the future, is, however, to the same trust, and to the same estate, when he says that when all his children shall be dead, the trustee is "to convey one half of said trust estate and all additions or increase thereto" to the children of his sons, and then, he repeats, that "as to the remaining portion of said trust estate and all additions or increase thereof" the trustee shall convey the same to the children of his daughters.

We submit that throughout the will there is no room to suppose that even one of these various references to his "said estate" and his "said trust estate", harks back to anything in his mind except his "estate" left in trust. So far the appellants will agree with this analysis of these references as all meaning one and the same "trust estate". But the testator having thus made this all clear, he proceeded to show in a conclusive way that he deemed the Mokuleia lease a very material part of his "said trust estate" as he had been using that term, and his own clear intention and expectation that it was to remain as part of it, indefinitely so far as he was concerned. That was his enterprise; the thing out of which, with the help of the rents from its sub-leases and those from the Ookala

lease, he was making his own living and expected his trustees to "carry on". That it was not in his mind as the one expectantly continuing central feature of his "estate" is simply incredible.

With the Mokuleia lease thus certainly in his mind as a part of his "said trust estate", to which his word "rents" applies, and from the subleases of which he was himself deriving rents; and with nothing in his estate to produce "rents" except his subleases at Mokuleia and Ookala, has he not shown his own expectation that *all* "rents" therefrom were to go to his wife and children,—because the word "rents" was used generally as to his "estate", and hence with reference to both leases, for, certainly, there is no evidence of any intent on his part that it should apply to one part of his "estate" but not to another part of it. Has he not indicated the leaseholds as the "estate" from which the "rents" were to be derived? If so, there is no necessity to go outside of the case to search for or imply some other "estate" from which such "rents" were to be obtained. Did or did he not expect the trustees to use any moneys coming in as rents from these subleases in their carrying on of his business, available for the support and maintenance of his family? Did he intend to prescribe a course for his trustees, different from that he was himself pursuing, while they should "carry on" his business? Without those rents being *used up* as they came in could he have either run the business *or* supported his family? And without using them up did he expect his *trustees* to do so?

In order to determine whether in such a case as this, the testator by "rents" meant rents from his subleases, and whether he meant the rents to be held as corpus or used as income, the law allows reference to all of the facts and circumstances surrounding the testator and the making of the will, conclusively appearing to have been within his own knowledge, such as the natural objects of his bounty and solicitude, the situation of the parties concerned and their relation to him, the amount and character of his property, the motives which may reasonably be supposed to operate with the testator in any disposition of his property under those circumstances and conditions and in view of those relations, and in fact any matter or fact may be considered which will enable the court to place itself in the position occupied by the testator at the time, and from there determine what his intentions were when he used expressions of uncertain meaning.

Therefore, we here summarize the facts, circumstances and conditions, which all clearly appear, there being no contradictory evidence anywhere, and all of which it must be assumed were actually within the knowledge of the testator at the time he made his will.

(a) *As to his family:* He had a wife and seven children, the youngest child three or four years of age and the eldest about sixteen years, all living with him on the Mokuleia ranch premises. (Tr. 121, 123).

(b) *As to his property and business:* He had no real estate (Tr. 122). His property consisted of these two leaseholds, besides which he had only some live-

stock, farming implements, and household furniture, all of which personalty was valued in the estate inventory at about $2,310.00, and the cash on hand at his death, in his agent's (Focke's) hands amounted to $816.59 (Tr. pp. 121-122). He was then and for nine years previous had been personally conducting a ranching business consisting of horses and cattle, on the greater part of the Mokuleia premises, and he had made various subleases of other parts to others from which he was receiving rents. As to the Ookala lease, he had a sugar contract (or sublease) with the Ookala Sugar Company under which he was receiving as rent 5 per cent of the sugar produced from the land (Tr. 123, 121).

(c) *As to his income, for his ranch operations and the support of himself and his family:*

At the time of his death he was receiving as rents from subleases of portions of the Mokuleia property a gross annual rental of $2723.50, out of which he had to pay a head rent to his lessor, J. P. Mendonca, of $1250.00, (Tr. 123), which left $1473.50 net, aside from taxes which he also had to pay to his lessor (Tr. 121).

While there is no evidence of what he himself had been deriving from Ookala in the several years before his death it does appear that for the year preceding his death the amount was $643.90, and as his taxes were then about $40.00 a year (see Ex. A, Tr. 135) the net for that year was say $603.90, and for the next year, 1893-1894, it was $642.79 gross, (Tr. 124-125),

and only $602.79 net, (Tr. p. 135). For the year 1894-1895 the gross was $851.63 gross and $811.63 net (Tr. 135). This was all he was receiving as sugar rent although Ookala Sugar Company had had the land since 1881, twelve years (Tr. 4) and in 1893 there were only seven years left under that sugar contract (Tr. 5). Was Gay expecting any increase? In later years the realizations grew, but that was manifestly because of the gradually larger sugar production and the later prosperity of the sugar business, with annexation first in prospect and then realized. We are here considering his income as he knew it when he made his will. It cannot be assumed that his income from Ookala sugar rent was greater before his death than afterwards. Averaging the three net figures for Ookala, just given, we have $672.77 as the average he then had himself any reasonably expectancy of receiving. The record also shows that during the first seven years of the trust the average amount received from the Ookala property was $1,383.54, but this figure cannot enter into any conception of the testator's expectations at the time he made his will. The complainants, the trustees, also put on evidence, and the remaindermen developed more, as to rents received from both leases even up to the time of the first trial, but we have consistently contended that figures which do not reflect conditions as they existed, to the testator's knowledge, when he made the will, are not pertinent on the question of his intent at that time. Adding the net rent from Moku-

leia subleases, $1,473.50, to that of Ookala, $672.77, and we have $2,146.27 as an approximate revenue from his subleases. Just what he received, himself, from his ranching enterprise, aside from rents from subleases, does not directly appear as his executor found no books or accounts (Tr. 124), but it does appear that after his death his trustees carried on that business along the same general lines as he had done in his lifetime, up to 1906 (Tr. 123), and for the first seven years after his death (i. e.—up to 1898) during which the Mokuleia subleases were producing $1,473.50 net, the average returns per annum on the Mokuleia property were $999.13, after including the income from all sources at Mokuleia, including the income from the subleases and rights of way and from the sales and disposition of cattle, stock and ranch profits (Tr. 124).

The testator's widow and children continued to live on the ranch until some time in April, 1895, when Mrs. Gay died, and the children were taken to Honolulu (Tr. 123).

At his death his estate was indebted to the extent of about $5,000.00, (Tr. 122). A burden inseparably connected with the holding of the Mokuleia lease was the necessity of keeping the land clear of a noxious shrub called lantana, at heavy expense, as, otherwise, there was danger of losing the head lease (Tr. 123).

The values of his two leaseholds were placed in the inventory of his estate as $7,500.00, for the Mokuleia lease, and $5,000.00 for the Ookala lease (Tr. 122). These values were placed on them by Mr. Focke as

executor according to his best judgment after conferring with the estate's attorney, Cecil Brown, and Tom Gay, decent's brother, "a practical cattleman" (Tr. 122). As to Ookala, the value of $5,000.00 was in view of its producing about $650.00 a year (Tr. 122). Values in these approximate amounts must be assumed as understood by the testator in connection with his own realization of what he had to leave, and what his trustees were to have and hold, and with which they were to work in continuing his business and maintaining his family.

(d) *As to the then existing and prospective conditions as to business, reasonably conceivable as known to the testator in connection with his business and property when he made the will:* The showing is clear and conclusive, as expressed in the testimony of T. H. Petrie, given on cross-examination and appearing on Tr. pages 131-132, that at the time the testator died there was nothing in prospect for his ranch business and property other than the horse and cattle business. Sugar was as yet so undeveloped that it wasn't a factor at all at Mokuleia. He expected his trustees to carry on "the business of ranching and stock-raising", as stated in his will (Tr. 16). The value put in the inventory of his estate was fixed from the cattleman's standpoint (Tr. 122). The testator could not in his wildest dreams ever have supposed that sugar would develop as it did in the after years, or that any sugar enterprise would develop next to his ranch whereby some of his grazing lands would become

valuable for sugar production and could be subleased to greater advantage than before. If those after conditions had existed while he lived, would *he* not have done what the trustees did? He would.

(e) And, finally, the testator was dying when on May 25, 1893, he made this will, and he knew it at the time, and therefore, on May 24th he sent his doctor to bring his lawyer to draw it. That done, he executed it on the 25th, (Tr. 139-140), and he died three days later (Tr. 121).

Under all the facts and circumstances surrounding the testator and the making of his will, what did he mean by his direction to his trustees "to pay the rents, income, issues and profits arising from and out of said trust estate" to his wife and his own children; and what did he mean by his "said trust estate" whenever he further used that term in his will?

First we submit that this will does, initially, manifest the testator's first purpose as that of the maintenance of his family, out of the estate he was leaving. His trustees were to undertake that and continue to do it. We scout the claim that he drew this will to prefer his future grandchildren to his own wife and children whose needs were immediate and who were then dependent upon him. We insist that the will does show his most immediate concern to be for his wife and little children,—a large family,—with no means of support or maintenance if not from what he should leave. We insist that this man is not open to the scorn that should be his portion had he set out to do

what appellants claim he did,—provide that his property should be conserved for his grandchildren though his wife and children might starve otherwise, as we shall *show* would have been their fair prospect had the trustees done otherwise than they did. No court of equity is going to assume a lack of affection in this man for his home ties, his wife, his little children, in the moment when, with a realization that he was dying, he *set about* handing over to his wife and his old and intimate friend, Focke, his trust under that will. Did he ask his wife to save all those sublease rents to be in the dim and distant future handed over to her grandchildren, denying them to her and her children whose care she would have to undertake, she and they to have only the income thereof which would be almost inconsequential in view of what that support and maintenance would require? She might lay her hands on these rents but not use a cent of them, either then or in her own prospective old age,—for in his mind she may have lived long,—however dire the necessities, or the distress for lack of them? Were that the deliberate intent of the testator, in the circumstances, it was a very cruel thing, unnatural, eccentric and abnormal. Nothing of the kind will be presumed. In fact the contrary will be presumed.

The trustees were to "carry on" after the testator. How did he mean they were to do it?

If, during the first four years after the testator's death (i. e —up to 1898) the trustees, continuing as he had done, realized a net profit from the Mokuleia

property as a whole, rents from subleases *included,* of only $999.13 (Tr. 124), say $1,000.00, and $672.77 net from Ookala, say $675.00, the total profit from his whole estate, as he knew it, was about $1,675.00. He was using all of the rents from both Mokuleia and Ookala to get it. Upon that he had to operate the ranch and sustain himself and his family. If he was thus operating, what did he have in mind that his wife and children would receive from his "estate" in the way of "rents, income, issues and profits" to be paid to his wife "for the term of her natural life, and to be applied by her for the support of herself and the support and maintenance" of his seven children, four girls and three boys, the youngest then only three or four years of age, and the oldest only about sixteen? And, after her death, what would be available "for the support and maintenance" of his three sons, and the "support, maintenance and education" of his four daughters? What income did he contemplate would be available? Did he intend that all of the rents from the sublease should be set apart as *principal* and not used as income, and that nothing but the income from those rents could be used and applied for his wife and children? It is clear that if his profit from the ranch operations was only $999.13 after Mokuleia income from all sources was taken into account, including the net rents from the Mokuleia subleases, $1,473.50, then, if instead of treating this $1,473.50 as income of his ranch operations, he had put it by as corpus for his then merely possible grandchildren, he would by his

operations have lost the difference between $1,473.50 and his $999.13 profit,—i. e.—lost $474.37 every year, and so he would himself, all the while in his lifetime and in his own operations, have been carrying on *at a loss* that same business he was by his will expecting his trustees could carry on at a profit. Our figure of a loss of $474.37 could of course be shaded a little if we logically carry out the supposed putting by of the rents, $1,473.50 from Mokuleia and $672.37 from Ookala, or a total of $2,146.27, which, invested say at 6 per cent would yield him $128.77 a year. It would make his loss $345.60 instead of $474.37.

And if the Mokuleia rents were to be put by as corpus, so should the Ookala rents,—but how could he have done it with a loss of $345.60 accumulating every year?

And would *he*, in such circumstances, keep on putting by that $2,146.27 every year as corpus, in all solicitude for his contingent generation of grandchildren as against each $128.77 his wife and children would get?

Take it another way: If the rents of $2,146.27 were accumulated and invested, and only the income at say 6 per cent allowed to his family, the effect would be:—

At end of	Corpus for the Remindermen.	Income per year for Family.
1st year	$2,146.27	$128.77
2nd "	4,292.54	257.54
3rd "	6,438.81	386.31

4th	"	8,585.08	515.08
5th	"	10,731.35	643.85
6th	"	12,877.62	772.62
7th	"	14,023.89	901.39
8th	"	17,179.16	1,030.16
9th	"	19,316.43	1,158.93
10th	"	21,462.70	1,287.70

Did the testator mean his family should have nothing to maintain and support them during the first year after his death, and for the second year, for his wife and seven dependent children only $128.77,—$10.73 per month? Or in the second year $21.46 per month? With eight to support, and rating all equally, that would provide $1.34 per month for each during the second year, or $2.68 each for the third year,—the monthly increase being at the rate of $1.34. And after ten long years $1,287.70 per year for all, or $107.30 per month for eight, or $13.40 per month for each? Such a thing would be mere absurdity with the climax capped by the contrast of a huge corpus accumulated up to $21,462.70 for the undeserving, unsuffering posterity to come after.

Did he have and mean to create after him a preference of that kind, against his own flesh and blood, in favor of an unborn future generation toward whom he had no obligation nor conceivable sentiment whatever? Can anyone get any ring of sincerity out of any assertion that he did?

The provision in the will that the trustees should carry on his business of ranching and stock raising "so

long as it can be done so profitably, and without loss", certainly carries the idea that they were to continue an existing venture while it continues to be profitable, —in other words, he implies that he considered that he himself had been operating at some profit; and we have shown that unless he treated and used the Mokuleia sublease rents as part of the ranch enterprise he was himself operating at a loss. Therefore he meant them to use those sublease rents as he had been doing.

Of course by "rents, income, issues and profits" he meant net, after payment of the operating expenses. Payment of those would contemplate application of no inconsiderable part of the rents from subleases, so that their full amount could never have been set aside as corpus anyway. The balance of profit would be so much less that we can see the pure fallacy of supposing he meant the rents to be classed as principal to be put by for an unborn generation of grandchildren. Appellant's very own contention, applied here, that the phrase "rents, income, issues and profits" is all embraced by the term "income", shows that rents are income. He knew that most of his income consisted of these rents. It could only be by a strained and unnatural construction that the payment to the life tenants of legal interest on the instalments of rent could be held to satisfy the requirement that the life tenants are to have *"rents, income, issues and profits"* of the estate and business, or held to satisfy the testator's intention here when he has said nothing that can be construed as meaning that all rents from the subleases were to be accumulated for the remaindermen.

See Elay's Appeal, 103 Pa. St. 300.

Further, Mokuleia was the testator's home place and that of his family. With it as a home after his death the widow and children had less need for living expenses than if that home were sold. He expected them to live there, and they all did, until the widow died, when they went in to Honolulu (Tr. 123).

The appellants inquire (brief, page 11) how the trustees are "to carry out the trust to support and maintain the six living children, or such of them as shall survive, out of the income of the investment of less than $25,000" (etc.),—this having reference to the time after 1934 when the Mokuleia lease will have expired and the corpus would be the $4,065.00 net proceeds from the sale of the livestock plus the $20,668.35 to be put by as corpus under the decree now appealed from. It is pointed out that the yield therefrom at 6 per cent would produce less than $1,500.00 which would be subject to deductions for trust administration expenses, and so there would be left about $1,200.00 a year. By parity, if that would be the case, with six (or less) fully grown persons presumably normal and able to help themselves to some extent, how much more grievous would it be if the trustees, on the testator's death, were to support and maintain seven infants, besides a widow, out of the income on such amount as the leases would probably have brought if converted at his death. We cannot assume they would have brought materially more than the values in the inventory. These were $7,500 for the Moku-

leia lease, $5,000 for the Ookala lease, $2,310 for the livestock, implements, household furniture, etc., and $816.59 in cash, (Tr. 122), a total of $15,626.59, from which the estate indebtedness of $5,000 would have to be deducted, which would have left $10,626.59 as corpus, out of the income of which the trustees would have had to support and maintain a larger number of persons in more helpless and imperative need than those who may be living after 1934,—and, to do it, would have had, at 6 per cent, $637.59 a year, gross, subject to trust administration expenses, at least 10 per cent, so that these beneficiaries then absolutely dependent would have had only $573.84 collectively. Divided by eight, each would have had $71.73 a year.

Did he make his will in the light of developments and better times that might come after his death to produce a better income? From what? He could not have foreseen the later sugar development. See, again, the impossibility of this as a factor in his mind, in view of Mr. Petrie's testimony on pages 131-132 of the Transcript.

Our courts in Hawaii, of course, take judicial notice of the geographical facts, such as the locations on the Island of Oahu of Honolulu, Ewa and Waialua, mentioned in Mr. Petrie's testimony, and the relative distances between them, and of the topographical conditions. Mokuleia is at Waialua (Tr. 2, 49), beyond all then prospective sugar development or supposed railroad. Without a railroad nothing but ranching was possible. The subleases at Mokuleia were not, of

course, for sugar. There were rice-lands, some of them poor for even that, as the tenants sometimes could not make them pay and abandoned them (Tr. 125). So the subleases were an uncertain source of revenue anyway.

Appellants cannot go beyond the first few years and point to changes of circumstances and management, long since, from which greater rentals were eventually derived through unforseen developments, and by these later figures show a better and better income which would finally relieve the stress of the first years. These later figures reflect no condition within the conception of the testator, and they cannot aid in any determination of his intent as expressed in his will.

The same must be said as to increases in value of the leaseholds in after years. The fact that Waialua Agricultural Company might now be willing to pay $90,000.00 for the Mokuleia lease (Tr. 129-131) cannot have the remotest bearing on the question of the construction of this will nor whether the leases should have been converted at the testator's death (see our objection, Tr. p. 129). Neither is the testimony of Mr. Wilder, the assessor, of any value, for the same reasons, and he was not willing himself, to "take any chance" on the value he gave (Tr. 132-133).

But the crowning fact, among all the surrounding facts and circumstances, was that Gay knew he was dying when he made this will. He was dealing with his "estate" *as he had it at the time,*—as he knew it,—and in the light of his own conception of what its income and sources of income would probably be.

Now come the remaindermen and ask the Court to do what we submit Gay never thought of,—to say that by his death the rents from his subleases which to him were income, became principal.

Appellants urge, and our Supreme Court agreed with them, that the use of the word "rents" may be taken as used with reference, not to the property the testator had on making his will, but to whatever he might later happen to have on his death. That is a mere presumption, and cannot be indulged when it is clear that the testator had nothing that could produce "rents" except these leaseholds and in his dying condition he could not have had any presumed reference to lands in fee he might acquire before his death. The argument seems to be that the general clause "rents, income, issues and profits" has a well recognized legal meaning, as including, comprehensively, all "income", and, analytically, that "rents" applies to land, "income" to personal property, etc. (brief p. 17). In other words, the point is that the testator used a "stock phrase", and must be presumed to have adopted it as descriptive merely of "income", without himself intending any special meaning by the word "rents". We submit such a theory of presumption falls when it is negatived by the facts.

We see nothing in the solicitude for a corpus theory, resting as it does, absolutely and only upon a like "stock" provision found in every will after any provision for a life estate,—like a habendum after a grant. Without a remainder provision there would

be partial intestacy. Similarly, words descriptive of increase or additions are "stock" forms to insure comprehensiveness. If the will otherwise manifested any intent to make an ultimate corpus the one object of the trust, there might be something to hang the argument upon, but the argued discretion as to when (not if) a sale is to be made to increase the trust estate, doesn't furnish that other manifestation so as to create an intent to beggar his wife and children, if necessary, in order to care for a merely prospective future generation. The inclusion of increase or additional means "if any", so that any such will be disposed of. In the same way we often find the added words "and accumulated (or unapplied) income, if any". Would that mean there must be some unapplied income?

THE LAW.

We take it that there is no law against the proposition that where it can be gathered from a will that the testator intended life tenants to have the enjoyment of property in the state he left it, the courts will carry out that intention; that every case will turn upon this question of intent, and that presumptions must give way to such intent whenever it appears, and, vice versa, that only in the absence of indicia of such intent will the courts make a legal presumption.

Appellants' have cited no cases holding otherwise. In fact the appellants' own cases establish it. (Brief, pages 26, 37-38, 41, 42), and appellants concede it (brief p. 26). The difficulty lies in determining what amounts to evidence of such an intention.

The rule as to presumed intention for conversion, expressed in Howe v. Dartmouth, 7 Vesey, 137, amounts to this: That where a will contains no language amounting to a specific bequest of personal estate, and some of the estate was at the time of the testator's death invested in wasting assets, and the personal estate is given in terms amounting to a general residuary bequest, to be enjoyed by persons in succession, as to tenants for life, with remainder over, the court will presume an intention on the part of the testator that such wasting assets should be converted into approved investments, the income of which will go to the life tenants and the corpus preserved for the remaindermen. Such is a summary of the rule as analyzed and applied in the cases of McDonald v. Irvine, 8 L. R. (Ch. Div.) 101, at p. 121, and Lichfield v. Baker, 2 Beav. 481, 483 (48 Eng. Repr. 1267).

Thus it will be seen that the rule is formulated and applied where the intent of the testator is not otherwise expressed or sufficiently indicated.

One of the assumptions upon which that rule was formulated is that there is no language in the will amounting to a specific bequest of the particular personal estate involved. Manifestly a specific bequest of a thing itself would dispose of it as it stood, to pass on in succession, as that would show an intent that it was itself to be held and enjoyed. That it may be of a wasting nature would be immaterial. It might be an animal, or a mechanical thing which with use would wear away, or anything that would depreciate

with the passage of time, a specific business or share in a business or particular investment as made, or as in our case a lease that will progress to its expiration.

It is contended by the appellants that in our case there was no specific devise of either of the leases; that this will makes merely a disposition, in bulk, of the testator's whole estate, thus making it the same as one of a merely general residuary devise. Our answer is that intent governs, and it does not have to stand or fall on the point of a specific or general devise. If specific, it is clear that the intent would appear from that fact alone. Lack of a specific devise does not shut out all other indicia of intent. Appellants have heretofore cited Perry on Trusts, Sec. 531, as saying that only where a lease is specifically given by a will to a life tenant will such tenant be entitled to receive it in specie, and that in the case at bar these leases are not specifically devised but pass only under a general devise which, it is said, is the legal equivalent of a mere residuary devise. But in Perry on Trusts, Sec. 541, it is also said that "a general direction to pay rents to the tenant for life, after the mention of leaseholds, *is* a specific devise; but it is still a matter of doubt upon the authorities, whether such a direction, unconnected with any mention of the leaseholds, is a specific devise or not". We say, therefore, that Sec. 451 of Perry on Trusts does not work against us here, because in our case there *was* specific mention of the Mokuleia leasehold, *after* the general devise, and we submit that specific mention afterwards is as good as

previous specific mention if the connection and identification appear. And in the case at bar, when it is clear that the testator did contemplate the Mokuleia lease as one to be held in specie by the trustees, in their discretion, and that it was part of his "said trust estate" carried by the general devise, there is no room for assuming one intention for one part of the "said trust estate", the Mokuleia lease, and another intention as to another part of it, the Ookala lease, inasmuch as both leases may be regarded as answering to property producing "rents".

In Perry on Trusts, Sec. 448, it is said, in effect, that the intention of the testator, as to whether certain property is to be converted or left to the enjoyment of the life tenants in specie, is to be ascertained from a construction of the will as a whole,—not one clause or one word only,—*and* from the character of the property, and the relations of the cestui que trust.

Couple the foregoing with the fact that a "merely general devise" of the testator's whole estate, which the case shows consisted only of two leaseholds (with some cattle incident to one of them), and we have, we think, a rather specific devise of just those leaseholds. This argument presumes that the testator knew at the time that his "estate" would on his death consist of just those particular leases, which we submit has been clearly shown.

The intention is to be determined from the will whenever that is clear in itself. The correct rule is that, although the intention of the testator must be gathered

from the will itself and cannot be shown by parol, yet when there is any ambiguity in the words used extrinsic evidence *is* admissible to show all of the surrounding facts and circumstances, as they existed at the time of making the will, including the condition of his estate, the relations of the parties to each other and their condition, thereby aiding in determining the meaning and intent of the testator from the language employed.

The case of Adams v. Cowen, 177 U. S. 471; 44 Law Ed. 851, contains a review of the law on the point of relevancy of the surrounding facts and circumstances of proper cases, and as it seems difficult to find any part of it that does not fit our case on the point of determining the testator's intention, we refrain from quoting it here at length. The features of the testator's knowledge of his estate, his own use of it in his lifetime, his expectancy of a similar application of it along certain lines after his death, the factor of a testator's natural solicitude for those dependent upon him, the factor of affection for the persons provided for,—are all taken into consideration,—from all of which the court determined his intention. In that case the testator was not dying when he made his will. It was merely clear that he was dealing with his property, as he held it and knew it, and that, being at an advanced age he "could not foresee the length of his days". The court observed, after recognizing his purpose, that "it would be a sad commentary on the wisdom of the law if that purpose was not recognized and enforced."

From Blake v. Hawkins, 98 U. S. 315, 324; 25 Law. Ed. 139, we quote:—

"It is a common remark, that, when interpreting a will, the attending circumstances of the testator, such as the condition of his family, and the amount and character of his property, may and ought to be taken into consideration. The interpretor may place himself in the position occupied by the testator when he made the will, and from that standpoint discover what was intended. Brown v. Thorndike, 15 Pick., 388; Postlethwaite's Appeal, 68 Pa. 477; Smith v. Bell, 6 Pet. 68. Such a method of procedure is, we think, appropriate to the present case.

"Mrs. Devereaux's will was made on the 23rd day of December, 1847, about eighteen months before her death. There is no reason to believe there was any essential change in the nature or the amount of her property between the date of her making the will and her decease, and it may fairly be assumed that what she had in June, 1849, the time of her death, she had when she made her testamentary disposition."

From Colton v. Colton, 127 U. S. 300; 32 Law. Ed. 139, we quote (from Law Ed. p. 145):—

"The situation of the testator at the time he framed these provisions is to be considered. *He made his will October 8, 1878; he died the next day.* It may be assumed that it was made in view of impending dissolution, in the very shadow of approaching death". This case is further replete with references to various facts and circumstances, including the age, condition and probable necessities of a beneficiary, all of which the court presumed were in the testator's mind and as explaining his intention.

In Lee v. Simpson, 134 U. S. 688; 33 L. Ed. 1038, at page 1045, the Court said:—

"Mrs. Clemson's distributive share in her sister's estate was, at the time Mrs. Clemson made her will, of small value, as she ultimately received from it, at most, only $601.94. Her share in her brother's estate was at that time also small, amounting only to $120.49, although, in fact, she received $150.00. *This was all the property which she had, or supposed she had, when she made her will, and all that she intended to dispose of.*"

"Putting ourselves in the position occupied by Mrs. Clemson when she made her will, as we are authorized to do, in view of the circumstances then existing, in order to discover from that standpoint what she intended (Blake v. Hawkins, 98 U. S. 315, 324 (25: 139, 141); Postlethwaite's Appeal, 68 Pa. 477, 480; McCall v. McCall, 4 Rich. Eq. 448, 455; Scaife v. Thomson, 15 S. C. 337, 357; Clerk v. Clark, 19 S. C. 346, 348, 349), we are of opinion that the will of Mrs. Clemson was intended by her to be, and was, a full execution of the power. She was entitled to bequests and legacies under the will and codicil of Mrs. Calhoun, which they spoke of as "property", and which Mrs. Clemson was authorized to dispose of as she pleased."

In Hite v. Hite, 19 L. R. A., 173, 176, we read:

"The law regards substance, and not form, and such a rule might result not only in a violation of the testator's intention, but it would give the power to the corporation to beggar the life tenants, who, in this case, are the wife and children of the testator, for the benefit of the remaindermen, who may perhaps be unknown to the testator, being unborn when the will was

executed. We are unwilling to adopt a rule which to us seems so arbitrary, and devoid of reason and justice."

And see also:

Corle v. Monkhouse, 47 N.J.E. 73; 20 Atl. 367, 369;
McLouth v. Hunt, 39 L. R. A. 230, 234; 154 N. Y. 179;
Anderson v. Messinger, 146 Fed. Rep. 929, 938;
Daniel v. Felt, 100 Fed. Rep. 727, 729;
In re Hoyt, 160 N. Y. 607; 55 N.E. 282;
Golden v. Littlejohn, 30 Wis. 351;
Burroughs v. Gaither, 7 Atl. 243-251;
39 Cyc. page 41, note 36;
Hinves v. Hinves, 3 Hare. 609;
Pickering v. Pickering, 4 Myl. & C. 289;
Kinmonth v. Brigham, 5 Allen (Mass.) 271, at 273-274.

From the case of Barber v. Pittsburg, etc. Ry. 166 U. S. 109 (41 Law ed. 936), appellants have quoted that "evidence of extrinstic circumstances, such as the testator's relation to persons, or the amount and condition of his estate, may be admitted to explain *ambiguities of description* in the will, but never to control the construction or extent of devises therein contained". (brief, pp. 14-15).

Precisely: The question in our case here is *from what property* did the testator intend his wife and children should have the "rents". If his leaseholds, our case is made out, and the above cited case is not inconsistent with the decisions of the same court, where such

extraneous matters were considered to ascertain intention.

For a similar analytical reason the argument made and authorities cited on page 14 of appellants' brief are inapplicable. There is a latent ambiguity in this will.

Although, in Lewin on Trusts and Trustees, (star-page 803, book page 635) it is said:

"In some cases a conversion of personal estate is implied. Thus as a general rule, if a testator gives his personal estate, or the residue of his personal estate, or the interest of his property, in trust for or to several persons in succession, and the property is of a wasting nature, as leaseholds, long annuities, etc., the court implies the intention that such perishable estate should assume a permanent character and so become capable of succession."

Yet is is further said on star-page 809 (book page 636):

"But an intention that the property should be enjoyed in specie may appear from the form of the bequest, or be collected from the terms in which it is expressed. As if there be a specific bequest of leaseholds or stock, *or* (author's italics) *IF THE TESTATOR ASSUME THAT THE PROPERTY IS TO REMAIN IN SPECIE BY SPEAKING OF THE DEVISEES OR LEGATEES AS IN THE PERCEPTION OF THE RENTS OF A LEASEHOLD ESTATE* (italics ours), or the dividends of stock, *or* (author's italics) if a testator negatives a sale at the time of his death by directing a conversation at a subsequent period.

"Thus, the property was decreed to be enjoyed in specie where . . . . . a testator having *leaseholds* (author's italics) gave *all his estate* (italics ours) to

A. and B. upon trust to permit C. to enjoy 'the *rents* (author's italics), issues, profits, interest, and annual proceeds thereof' for her life, and on her decease upon trust for the two daughters of C . . . So, where a testator having *leaseholds* (author's italics) and being entitled to an annuity per autre vie gave to his wife 'all the interest, *rents,* (author's italics) dividends, annual produce or profits, use and enjoyment' of *all his real and personal estate* (italics ours) for her life, and after her decease to A." (citing Goodenough v. Tremando, 2 Beav. 512, and Pickering v. Pickering, 4 Myl. & C. 269).

Cases dealing with bonds, worth a premium over their par or face value, and involving the question of whether the trustee should sell the bond to convert the *premium* into capital for the benefit of the remaindermen, instead of holding the bond and allowing its premium value to wear away as the bond approaches maturity, are also in point here.

An example of such a "premium" case is where bonds have been bought at a market or fair value in excess of their par or face value and are then held, say until their maturity, with the *premium value* (i. e. value over par) gradually diminishing with their approach toward maturity, until, at maturity, they are worth only their par or face value. In a trust where certain persons (say life tenants) are entitled to receive the income from the trust estate, with remainder over to other parties, the question is whether the trustee holding such bonds, either bought at or having a premium value, and which premium value is part of the principal of the trust, should pay to the life tenants all of the income

from the invested principal or deduct and accumulate from the income received from the bonds, from time to time, an amount which will eventually equal that part of the principal which was represented by the premium value of the bond (i.e.—over par or face value) so as to offset the gradual depreciation of that value and thereby save that value, as principal, for the remainderman. The contention has been made in such cases, for the remainderman, that if this were not done it would follow that a part of the principal would be used up (wasted away) at the expense of the remainderman while if the trustees were to sell the bonds while the premium had a value that value would be converted into a permanent rather than a wasting principal and be saved to the remainderman and the life tenant would still have all of the income from the principal in its new and increased form.

In some bond premium cases the bonds were owned by the testator and passed on to the trustee as part of the trust estate. In others the bonds were purchased by the trustee after the testator's death. In both classes of cases we find decisions for and against the proposition of conversion being called for. In each case, in each class, the decision turns upon the *intention* of the testator.

With respect to the bond premium cases where the testator leaves and the trustee receives bonds worth a premium, which the testator held in his lifetime, there and the same question arises, as in the case at bar or are two lines of decisions, just as in the case at bar,

any other case of a leasehold held and passed to the trustee by the testator, namely: did or did not the testator intend the trustee to hold such bonds in specie? If he did, the trustee need not convert the premium into principal,—otherwise the trustee must so convert,—depending in each case upon the intention of the testator as gathered from the will and in the light of all of the then surrounding facts and circumstances. In those cases where the trustee has purchased bonds at a premium after the testator's death, there are those which hold that whenever the trustee was authorized by the testator (or by a statute) to make a particular kind of investment, or invest in a certain class of securities, this is as good as where the testator does it himself before his death. In each case the rule is that the testator's intent is to govern.

In McLouth v. Hunt, 39 L.R.A. 230 (154 N.Y. 179), the trust was of a *residuary* estate, with no property thereof specifically named. The trustees were to "take, receive, hold, care for, preserve, maintain, invest and reinvest, convert, sell, lease, and collect the same, in all things, *as in their discretion* may seem advantageous for the benefit, respectively, of my said three grandsons".

The court discussed the analogous case of life tenant and remainderman, and, as the analysis there made, and its comparison with other cases, and distinction from others apparently but not really different, are so directly in point with the case now before this Court, we refrain from quoting at length, and refer this Court

particularly to the text of the decision beginning near the top of the second column of page 234 through the paragraph which ends near the middle of the second column on page 235. We merely point out here that it was held that *no arbitrary rule applies and that the intention* of the testatrix *was to control,* to be ascertained "from the language employed in the creation of the trust, from the relations of the parties to each other their condition, and all the surrounding facts and circumstances of the case." It was held that under the facts of the case no conversion was intended.

Depreciation is Immaterial.

The fact that the property in the case at bar is a *leasehold* which is running toward its end and will in time expire and leave no value (or a reduced value) for the remaindermen does not remove it from the principles which govern the relative rights of life tenants and remaindermen with respect to property which is being *depreciated* in value by the exercise of the rights of the life tenant. There is no difference in principle between this and the case of property which is being *mined* by a life tenant, by operations which, if sufficiently continued, will exhaust the property, as a mine, and perhaps leave it practically worthless for any other purpose. The question there is not whether the remainderman may or may not finally come into an estate of value, but whether the life tenant may or may not work and perhaps exhaust the property.

There are cases which hold, generally, that a life

tenant may mine or quarry lands only to the extent of continuing to operate mines or quarries already opened by the testator and work them to exhaustion, but may not open new ones.

See Higgins Oil & Fuel Co. v. Snow, 113 Fed. 433, 439; and see Note in 36 L.R.A. (N.S.) pages 1090-1105.

The mining cases also show that when the owner of land has once impressed upon it the *character* of mining land, the life tenant may continue to use it in that character and even open new mines and similarly work them. In the Higgins case (supra) the court said: "The authorities all agree that there is no restriction when the land has once been used for mining purposes before the life tenant comes in; and they now go a step further, and hold that mining will be allowed if the owner of the preceding estate has fixed on it the character of mining land *by lease or the like,* though no mines were opened. Griffith (Ill) 37 N.E. 99; Kean v. Bartlett (supra) (23 S. E. 664; 31 L. R. A. 130); Seager v. McCabe, supra (52 N. W. 299; 16 L. R. A. 247)."

And see note in 36 L. R. A., (N.S.) page 1105-6, and cases there cited to same effect.

Therefore, in our case here, the trustees were entitled, as they did, to follow the precedent set by the testator in having made subleases of other parts of the lands, and make new ones,—which are now proving so profitable.

THE ENGLISH CASES.

Goodenough v. Tremamando, 2 Beav. 512 (48 *Eng. Repr.* 1280), is discussed in the first decision of our Supreme Court (Tr. 57-58). It was held in that case that it could not be held to be a case for conversion without striking out the word "rents" from the will, and as there was no other property belonging to the testator except the leaseholds to which the term "rents" was applicable, it would be held to so apply.

Our Supreme Court relied upon the cases of Pickup v. Atkinson 4 Hare, 624 (67 Eng. Repr. 797); Pickering v. Pickering, 4 Myl. & Cr. 289, (41 Eng. Repr. 113, 116); and Chambers v. Chambers, 15 Sim. 183 (60 Eng. Repr. 587). We cannot read any of these cases, or others mentioned in that decision, without the conviction that had it been in evidence in any of those cases that the testator made his will knowing himself to be dying, it would not have been *possible* for the Court (as in Pickup v. Atkinson) to have indulged a legal presumption that (then having no real estate) he must have had in mind some future acquisition of real estate before his death, and not his leaseholds, when he gave the "rents" from his "estate" to the life tenants.

Where, in Pickup v. Atkinson, it was held that the leasehold should be converted, it was upon the ground that there was nothing to qualify the apparently simple intention of the testator that the general residue of his estate should be enjoyed by several persons in succession. Nevertheless it was expressly said by the court, "*but*, if the intention of the testator appears to be that

the first taker shall enjoy the property in that state in which it exists at his death, *the court is bound to give effect to that intention*". This case was apparently decided (as to whether or not a leasehold should be converted) *solely* upon the word "rents" and the assumption that the word "rents" need not be taken as meaning rents from the leasehold *merely because* the testator had no real estate,—the court taking the view that the testator might acquire some real estate before his death, and it could be assumed that "rents" would relate to his estate at his death whatever it might be. Though this case seems to stand absolutely alone, in this presumed used of the word "rents", it is nevertheless even in this case admitted that *if there were any other circumstances* to be considered *in connection with* the word "rents" this word might then be material in connection with them in ascertaining whether or not the testator could have had any particular object in mind to which the word might be directed.

In *Wareham v. Brewin* (2 Ch. Div. 31) there *was* real estate, as well as leasehold property, from which the court deduced that the testator used the word "rents" with respect to the real estate, and therefore it could not be presumed that the testator had reference to leasehold rents. The implication is clear that, had there been no real estate, the use of the word "rents" might be "sufficient indication *to outweigh* the general rule that the tenant for life is not to receive the whole of the rents of the leasehold property". There was a mere residuary devise with no specific reference to

leaseholds, and nothing else in the will to indicate whether the testator did or did not intend the life tenants to have the rents from the leaseholds.

EQUITABLE CONVERSION.

First we submit that the doctrine of equitable conversion could work no equities in this case. It presumes that done which ought to have been done. That is, it goes back to a time when a duty should have been performed and requires the party in default to make the parties whole according to the rights held to have been theirs at the time the duty should have been performed. It could not be applied here, so as to work an equitable conversion of these leases or either of them as though at the inception of the trust. Had the leases then been sold no such realizations could have come in as did subsequently come in. Even though there should have been a conversion at that time, whereby a corpus should be set apart for the remaindermen, no court of equity would at this time go back so far as to set apart as corpus for the remaindermen only the then probable sale value of the leases and give all the rest of the rent realizations to the life tenants. Neither would it put on the leases any such value as at the inception of the trust as they would have brought, if they had then been sold, and give the life tenants only the income (interest) on that, and say the rest is all corpus. If the doctrine of equitable conversion could apply at all, it would have to be so done as to give, at this time, such value to the leaseholds as the subsequent realizations show was

the real (although unknown and latent) value then, and apportion those realizations, now, on an equitable basis, as would apply to Ookala if it should be held that that lease should have been converted.

However, we think the law is clear that equitable conversion cannot be applied in this case because any manifestation of the testator's intent that the property concerned shall be enjoyed in specie, or that it may be held in the discretion of his trustee, negatives the application of the doctrine.

We submit that if by the testator's direction to the trustees "to pay the *rents,* income, issues and profits" of his "trust estate" to his wife and children it is clear, as we contend, that he intended the "rents" from his *leaseholds,* then both leases were to be held by the trustees in specie for the enjoyment of the life tenants.

Should it be held, however, that the provision for the payment of "rents" is not to be construed to mean rents from the leaseholds, then the doctrine of equitable conversion would still not apply to the Mokuleia lease, because of the special power given the trustees to hold that lease is their discretion,—which matter we will present in the following particular manner:

AS TO THE MOKULEIA LEASE AND RENTS.

It is submitted that in addition to the provision for the payment of the "rents" from the testator's "trust estate", the further provisions of the will which relate specifically to the Mokuleia ranch (and hence necessarily to the leasehold) expressly manifest his intent

that the Mokuleia lease, at least, should not be converted but should be held by the trustees and only disposed of in their discretion.

With reference to the Mokuleia property the testator made specific provisions, appearing at length in the paragraph on Transcript pages 15 and 16 (beginning at the bottom of page 15), which we will quote:—

"It is my *wish* and I hereby *direct* that my said trustees or their successors or successor, *shall* manage, conduct and *carry on* the business of ranching and stock raising at Mokuleia".

This is his *wish* and *direction*; they *shall* carry it on. At once the doctrine of equitable conversion is made inapplicable as of the inception of the trust. It is argued by appellants, at great length, that the doctrine is not inapplicable but that its application is only postponed, because of the words next following:—

"so long as it can be done so profitably, and without loss".

That is, they argue, these words mean the trustees must preserve his "estate" from loss. He didn't say so. He was not here referring to his "estate" but to his *business at* Mokuleia. He had been running that business. It was that business his trustees were to carry on. We have already shown how he had been carrying it on and what he supposed his trustees would have with which to do it. He was making a profit, from his standpoint and in his own way of treating the sublease rents as income available for operating expenses. While he held the Mokuleia lease it was "wast-

ing away", and he knew it. Nevertheless he said his trustees *shall* carry on that business, which meant hold that lease. So it was not any "loss" to his "estate" that he meant when he said "without loss". He said "*profitably* and without loss". He meant *as a business, assuming the lease would be held.* If he had regarded any wasting away of the lease as "loss" he would not have directed them to hold it and carry on the business. And those provisions, taken as a whole, show he had no idea of the lease being disposed of so long as the trustees should *continue to make money,*—to make *profits out of the business and the holding of the Mokuleia property.*

The words "my said trustees or their successors or successor", show that he contemplated that his wife and Focke might do it as long as both of them lived and served as trustees, perhaps many years, and after one should cease to be a trustee the other should so continue, and any other trustees or trustee after them. For him it was a wide-open undertaking so far as duration was concerned.

Next comes the further language:—

"and I hereby empower them or their successors or successor at any time when in their discretion they think that a sale of all the property at said Mokuleia, would by reinvestment of the money realized from such sale of said property be beneficial and inure to the benefit of or increase the trust estate created under this will, to sell and convey the said property at Mokuleia free and barred of the trust created by this will".

Strenuously, now, it is urged by the appellants that

these words establish an intent that the sole object of the discretion as to sale is that it must be exercised *when* a sale of all the property *would* increase the trust estate, and that the power ceases to be discretionary and becomes obligatory when that condition arises, as, otherwise, "a discretionary power of sale to benefit an estate can be resolved into a power to put that estate out of existence" (brief, p. 21).

Let us analyze again. He said "empower", not "require". He said "when in *their* discretion *they* think". The discretion is absolutely in their hands. *Their* judgment is to control.

He has two separate things in that whole provision. One, all by itself, is that of running the business,—any length of time,—they are not expected to stop so long as that business, as such, continues to be profitable. That means making *profits,* and making them for the wife and children. We submit that there is one great outstanding feature of the will,—the wife and children are to have the profits indefinitely, which contemplated holding the lease indefinitely, to its very end perhaps. But, he qualified the otherwise mandatory direction to carry on the business even if it might still be profitable. He *empowered* the trustees to sell, in their discretion, but we submit that the qualification on that power, that it should only be done if it would be beneficial and increase the trust estate, did not make the power of sale dominant over the charge to carry on the ranch business, nor make an increase of the trust estate an object paramount over that of continuance of a profitable busi-

ness. They do not have to sell, but they may. The power of sale was *not* intended as a means of stopping the wasting away of the lease; he counted on that. Hence it *did not mean* that an *"increase" was to be effected by a conversion of the lease.*

Did the sale in 1906 of the livestock and moveable assets of the ranching business bring the trustees to the point where, having ceased to operate a "ranching and stock-raising business", the *power* and discretion as to a sale became a *duty*? In the first place the power of sale was not in suspense while they should continue the ranching business. They were empowered to sell "at any time",—regardless of the ranching business. While they were making profits from that business they certainly did not have to sell,—ever,—except in their discretion; and when they discovered a source promising an increase "rents, income, issues and profits", the expansion of the testator's scheme of subleasing portions of the premises, on sugar rentals that offered substantial increases of income, did they abuse the discretion reposed in them by the testator with respect to operating "profitably and without loss"? They turned the ranch premises into a gold mine (as events proved). The change of use was within the scope of the testator's real intent that they should operate the Mokuleia property "profitably and without loss", and the greater profit depended upon continuing to hold the lease, which they could do because they could hold it anyway under the scheme for lesser profit, entirely as authorized by the will notwithstanding the lease was approaching matur-

ity and in time would expire. The trustees were not required to *create* a corpus of another kind. That would distinctly have been for the benefit of the remaindermen and to the prejudice of the life tenants. Appellants say there is nothing to indicate an intention to favor the life tenants as against the remaindermen. We answer that there is. He put the life tenants first, as the objects of his bounty. If there were no specific expression at all in the will of such an intention the law implies it.

As to presumptions, as between the life tenant and remainderman, we quote from Lovering v. Minot, 9 Cush. (Mass) 151, 157:—

"It is contrary to the presumed intent of the testator, to narrow the benefit intended for the first object of his bounty, for the benefit of an object more remote.

"Besides, the words of the will are, 'the income', with nothing to restrain them, and make them include anything less than the whole income".

From Vol. 11 Enc. of U. S. Supreme Court Reporter, page 1049, under the sub-title "Presumptions in Aid of Construction" (of Wills) we quote:—

"2. In Favor of First Taker. The first taker is always the favorite object of testator's bounty, and as such entitled to the benefit of every implication". (citing Barber v. Pittsburg, etc. Ry. Co., 166 U. S. 83, 100; 41 Law. Ed. 925, 933).

Let us come back to 1906 when the trustees stopped operating the property as a ranch. They did not *then* think a sale advisable. If they erred in judgment,

would the doctrine of equitable conversion apply, and if they did not err in judgment, would the doctrine not apply? The answer is that the discretion reposed in them absolutely swept away the application of the doctrine at all. Well, suppose they had *sold.* Let us suppose they sold on the basis that the past realizations of the lease would forecast those which might be expected from the leasehold during the then remaining twenty-eight years of its term. That would be a normal view to take of it. Up to then there had been sugar rents only for eight years, the average having been $4,984.06 per annum (Tr. 127), and other rents had in 1906 been $3,153.50 for seven years. $4,984.06 plus $3,153.50 makes $8,137.56 gross. The head rent was $1,250. a year, which made the net income from rentals $6,887.56. But that was not all profit. Aside from administration expenses of the trust, say 10%, which would reduce the net to $6,198.81, there was the very heavy drain for the cost of keeping down the lantana, as failure in that might result in a cancellation of the head lease. The testimony is that " the total income of the Mokuleia property from the inception of the trust down to 1907, was $90,690.63, including the ranch business and everything with it. The net for those years was $6,266.37. All that the life tenants got from 1893 to 1907 was practically $6,000., not including the Ookala lease" (Tr. 126); and the reason the Mokuleia expenses "were so large as $84,424.00" during those years from 1893 to 1907 was that "one large item was the cleaning of the lantanas which cost us thousands

of dollars at that time", because the lantana "covered the pastures and was destroying them" (Tr. 126-127). Had the trustees sold (although Focke said that because of the lantana in the pastures "we could *not* sell them",—Tr. 127) the Mokuleia lease in 1906 on a then anticipated average yearly income of $6,000 net, would they have realized $90,000? They would not. $90,000 is what Petrie said the Waialua Agricultural Company would pay in 1920. Did the trustees abuse their discretion when they did not sell in 1906? They did not. Should they have sold say in 1916? Well, why? And who is to say why? What was the income going to be; what would it have brought, in 1916, or 1915, or 1917? The *court* is not going to exercise that discretion. The court will not say when, if ever, the Mokuleia lease should be converted. *Their's* is the discretion: when "*they* think" it wise.

In the words of the trial judge in his first decision (Tr. 37), "If the testator had, therefore, intended to impose on his trustees the absolute duty of preserving an estate for the benefit of his grandchildren, he would have directed them to convert the leaseholds of which he was possessed, into a more permanent form of investment. Instead of doing this, however, we find", —(etc).

Respecting the law as to equitable conversion, we present the following:—

In Alexander on Wills, Vol. 2, Sec. 808; it is said:—

"direction that executors shall at their discretion either sell lands in a certain place, and invest the pro-

ceeds in more rentable property or use the proceeds in improving the land unsold, does not effect a constructive conversion, the authority to the executors being discretionary merely. And a direction to sell a homestead accompanied by a direction not to do so until the widow to whom it has been left in lieu of dower shall cease to desire it as her home, nor unless it will sell for ten thousand dollars, if not sufficiently positive to effect a constructive conversion."

From Power v. Cassidy, 79 N. Y. 613, 614, we quote:

"To constitute a conversion of real estate into personal, in the absence of an actual sale, it must be made the duty of, and obligatory upon, the trustees to sell it in any event. Such conversion rests upon the principle that equity considers that as done which ought to have been done. A mere discretionary power of selling produces no such result."

In Hobson v. Hale, 95 N. Y. 605, it is said:

"The will must, in terms or by necessary implication, disclose an intent to convert, in order to sustain the theory of equitable conversion."

Power v. Cassidy, and Hobson v. Hale, (supra) were quoted and approved in Ford v. Ford, 70 Wis. 19; (5 Am. St. Rep. 117; 33 N. W. 188).

In the case of Taylor v. Haskell, 178 Pa. St. 106, 111, (35 Atl. 732), there was not positive direction to sell. The court said: "The words 'the balance of the property to remain as it is under the case of my husband', indicate, as before noticed, a desire that its character should not be changed; then follow the words 'my husband to have power to sell at any time' (if he chooses to take the $2000. in money). This language fails

to express any positive direction to sell; at most confers a power to be exercised at the option of the executor. To establish a conversion of land into money under a will, the sale must be absolutely directed, irrespective of contingencies, and independent of discretion: (citing cases)."

In the case of Sauerbier's Estate, 202 Pa. St. 187, 195, (51 Atl. 751), the court said: "The codicil in this case is the last expression of the intent of the testator, and it certainly does not contain a positive and absolute direction to sell the real estate described in the petition, but confers only a discretionary power on the executrix to sell it after the expiration of five years from his death. If, as Mr. Justice Mitchell says, in Yerkes v. Yerkes (200 Pa. 223) 'The presumption, therefore, no matter what the form of words used, is always against conversion, and even where it is required, it must be kept within the limits of absolute necessity; 'if, as Chief Justice Thompson said, in Neely v. Grantham (58 Pa. 437); 'nor will it follow even from an inevitable necessity to sell in order to administer some provision of the will;' if, as stated by the Supreme Court, in Jonas v. Caldwell (97 Pa. 45): 'it must not rest in the discretion of the executor, nor depend upon contingencies'; . . . . and if, as decided in Henry v. McClosky (9 Watts (Pa) 145) where there is not positive direction of a testator to sell his real estate, but a mere power, dependent for its exercise upon the volition of the executor, or the consent of a third party, and before such a sale in pursuance of such volition or consent there is

a transmission of one of the shares . . . . the share so devolved or transmitted passes to the heir of the deceased owner as real estate, the premises described in the petition cannot be considered as converted by the codicil."

"The test is, has the will or deed absolutely directed that the conversion be made? In order to work a conversion while the property remains unchanged in form, there must be a clear and imperative direction to convert it. If the act of converting it is left to the option, discretion or choosing of the trustees or others charged with making it, no equitable conversion will take place because no duty to make the change rests upon them."

Howard v. Peavey, 128 Ill. 430; 21 N. E. 503, 504, citing 3 Pom. Eq. Jur. Sec. 1159 et seq.

See also the following:

Darling v. Darlington, 160 Pa. St. 65; 28 Atl. 503, 504;

In Re Cobb's Estate, 36 N. Y. Supp. 448, 449.

In Re Hardenburg, 52 N. Y. Supp. 845, 846;

White v. Howard, 46 N. Y. 144;

Christopher v. Mungen, 61 Fla. 513; 534; 55 So. 273, 277;

Bennett v. Gallaher, 115 Tenn. 568; 92 S. W. 66, 67;

Wheless v. Wheless, 92 Tenn. 293; 21 S. W. 595;

Bedford v. Bedford, 110 Tenn. 204; 75 S. W. 1017.

The very recent case of In Re Nicholson, 2 Ch. Div. 111, seems to be a modern English application of the law in that jurisdiction, directly adverse to the construction of the will sought by the remaindermen here. We add the case of Miller v. Miller, 41 L. S. Ch. N. S. 291,

(L. R. 13 Eq. 263, 20 Week. Rep. 324) where the will empowered the trustees to sell certain property "when, in their discretion, it may seem advisable", and directed that the rents and profits until sale be considered as part of the personal estate, and applied in such manner as the dividends or interest to arise from the investment of the sale money. It was held that one to whom the income of the investment is given for life is entitled absolutely to the royalties accruing for a period of ten years after the testator's death from certain brick fields (the soil of which was being "mined" in making bricks), the trustees having, in the exercise of their discretion, retained the property in the belief that they might sell it later at a higher price for building purposes.

So, in the case now before this Court, the Trustees, in their discretion as to any sale, elected to hold on to the Mokuleia leasehold, though it was lessening in years, because they saw they could get greater income from it by so doing and subleasing it to others, than by continuing the ranch business.

For an American point of view as to the English cases we cite Hemenway v. Hemenway, 134 Mass. 446, where it is said:

"The English cases go to the whole length of deciding that, whenever a fund is held upon an authorized permanent investment, the tenant for life received the entire actual income . . . When a trust fund is in court, the court would not ordinarily direct an investment in this stock (East India stock, even though authorized) unless there were special reasons for favor-

ing the life tenant . . . . But in Cockburn v. Peel, Lord Justice Turner was careful to say that the decision was not intended to embarrass trustees in the exercise of the discretion which the statute gave them when the funds were not in court, and that they would be entitled to protection when they acted bona fide in the exercise of that discretion. And this statement was affirmed and applied in Hume v. Richardson, 4 De G., F. & J. 29, the next year. The latter case went on to decide that, where trustees, in the exercise of their discretion, retained or made investment in East India stock, the tenant for life was entitled to the whole income arising from such investments. The same conclusion was reached by Lord Cairns, in a later case, in which Hume v. Richardson was not referred to, with regard not only to East India stock, but other securities which the testator had authorized as permanent investments, and which would otherwise have been unauthorized. (Brown v. Gellatly, L. R. 2 Ch. 751. See, further, Meyer v. Simonsen, 5 De G. & Sm. 723, 726)."

For "bond premium cases", in addition to that of McLouth v. Hunt, (154 N. Y. 179, 48 N. E. 548, 39 L. R. A. 230), supra, which go into the effect of discretionary power on an otherwise presumed intent of conversion, and the doctrine of equitable conversion, see

Hite v. Hite, 19 L.R.A. 173-175 (equitable conversion);

Higgins v. Beck, 116 Me. 127; 4 Am. Law. Rep. 1245 (a residuary devise);

Shaw v. Cordis, 143 Mass. 444;

Hemenway v. Hemenway, 134 Mass. 446 (a residuary devise);

In Re Hoyt, 160 N. Y. 607; 55 N. E. 282;
In Re Johnson, 67 N. Y. Supp. 1004, 1010;

In 2 Corpus Juris, p. 1328, under the head of "amortization" the rule stated relates to bonds purchased by the trustee. It is expressly said, in note 27, "if the bonds are received from the estate of the testator, then the rule in McLouth v. Hunt prevails".

The case of in re Chapman, 66 N. Y. Supp. 236, 238, a steamship was involved. The testator gave to his wife, for life, the "rents, profit and income" of his "estate". The running of the steamship was contemplated, and this was held to exclude necessity for its conversion, and no sinking fund to replace the value of the vessel was allowable.

APPORTIONMENT OF RENTS.

Appellants claim that the full amount of all rents from the Ookala lease should be treated as corpus.

Should the Court hold that the Ookala lease should have been converted, and, because it was not, there must now be an apportionment of the rents between corpus and income, we submit that the method used by the circuit judge was correct.

There is an incomplete expression in the decision of the circuit court, appearing on Transcript page 70. There should have been added after the words "whole sum actually received" (in line 12) the words "at the time it was received". This will make the statement an almost verbatim reproduction of that in Kinmonth v. Brigham, 5 Allen (Mass.) at page 280, which the

circuit judge was manifestly adopting. The rule so stated is the correct one in such a case.

However, we will first notice the four courses which appellants say were open to the trustees at the beginning of the trust,—one of which, it is claimed, should have been adopted (brief, p. 44).

1st. That the Ookala leasehold could then have been valued, and the life tenants given 6% on that value per annum. Valued? On what basis? The value of $5000. in the inventory was a guess. Focke's explanation of it appears on Tr. p. 145. It was an old lease, made in 1876 originally to expire in 1901, but of which Gay procured a 7 year extension before he died, bringing the term up to 1908, but the sublease or sugar contract with Ookala Sugar Co. was then limited to expire in 1901, and an extension of that sublease was not obtained until 1900,—seven years after Gay's death. As it stood, at the inception of the trust, what was it worth? The income from it was not fixed, but depended on the value of the share of sugar paid as rent, which depended on varying crop production, agricultural conditions, and sugar prices. (For a parity see Wilder's testimony, Tr. p. 133). Any value would be a guess, based on no principle. Focke's reasons for the $5000. value are shown on Tr. p. 145. And if that value had been placed upon it, as representing corpus, where would be the application of this first suggested method, when in fact it was not sold? If it was in fact *worth* more,—and it was, as the later years showed,—the first erratic guess of $5000. would not hold, because

a thing of that value would never have produced $34,-329.34 by 1908. There was no basis for valuation.

2nd. It could have been sold, and the proceeds invested, as corpus, and the income therefrom paid to the life-tenants.

Had it been offered for sale, the same uncertainty as to its value, or any way of figuring it, could have had but one effect on the bids. The bidders would scarcely take a chance on obtaining more income from it than it had been producing. Any buyer would have been a speculator and not an investor. The sugar contract then only had seven years to run. Perhaps a renewal could then have been negotiated, perhaps not. Let it be noted that the appellants are not now saying it should then have been sold. Had that been done the "law" they contend for might have been satisfied, but would they now be able to claim a "corpus" of $34,-329.34 or even of $20,668.35? What a disaster it would have been for everyone if this guardian ad litem had on the testator's death been in charge and converted the lease.

3rd. The trustees "could have invested the rents as received and paid the income to the life tenants": This is untenable because part of every amount received as rent was necessarily income to some extent, for if nothing were allowed out of it for income to the life tenants they would have received *no income* on that until-then outstanding capital since the testator's death. This course would involve an impounding of income to be held and invested as capital. The proof of this is

conclusive when we consider that a person contemplating the purchase of a lease, even on a fixed rent, would figure that if he bought it he would buy the right to the accruing net rents (or rather the right to collect them) and if all went well he would eventually receive them all. The aggregate would not *all* be a return of his principal invested in the purchase because he would pay out the whole amount to get it. The realizations from rents would be principal and interest combined.

4th. The trustees could have paid the rents as received to the tenants for life "upon receiving reasonable security to preserve the fund for the remaindermen", and they say that this was what was *done* as to the "fund", but without any security having been taken, and that having "elected" to take the fourth course, the life tenants are not at liberty to ask anything more. This is likewise untenable if part of each sum was income. Furthermore, *when* did the life tenants or even the trustees "elect" to adopt this "fourth course"? Did the life tenants "elect" or "acquiesce", and are the life tenants estopped from saying otherwise. That is, those *babies* of the year 1893 "elected" and so became "estopped". The record shows that no one ever dreamed that the rents, in toto, were anything but income for the life tenants, until, in July of 1919, a doubt was expressed by the trustees' counsel, and stated to the trustees, in consequence of which the bill for instruction was filed in this case (Tr. 125).

As to the correct method of apportionment, it is clear that anticipatory methods, imaginable as of the time of

the testator's death, have no application here, because they are at best only substitutes for lack of anything more certain. No such method would apply at all if the case were susceptible of accurate determination. Then they would be forecasting an uncertainty. Here the lease was not sold, and we know just what it did produce throughout its existence.

We can now determine mathematically the actual (then latent) value of the Ookala lease, and could that then have been known, a purchaser would, in theory at least, have paid that value, here determined as $20,-668.35, because, by investing that sum then, with annual rests, etc., he would have obtained a return of his principal so invested, with 6% interest, at the end of the lease.

As sustaining the correctness of the method and analysis stated in Kinmonth v. Brigham, (5 Allen, 270) in a case of this kind, we refer the Court to the following cases:

Rupert v. McArdle, Annot. Cas. 1916 B. p. 126 (42 App. Cas. D. C., 392);

Underhill on Trusts and Trustees, pages 236, 237 and 244;

In re Earl of Chesterfield's Trusts, 24 L. R. Ch. Div. 643;

Westcott v. Nickerson, 120 Mass., 410;

Wilkinson v. Duncan, 23 Beav. 469;

Furniss v. Cruikshank, 130 N. E. 625; at 629-630 (paragraphs 7 and 8);

Edwards v. Edwards, 183 Mass. 581; 67 N. E. 658;

Lawrence v. Littlefield, 215 N. Y. 361; 109 N. E. 611;

Roosevelt v. Roosevelt, 5 Redf. Surr. (N. Y.) 264;

Beavan v. Beavan, 24 L. R. Ch. Div. 651, 652, 653.

The latest English case we have found dealing with the apportionment between capital and income, in a case of this kind, is that of In re Hollebone (1919), 2 Ch. 93. There, a testator who was a partner in a firm of stockbrokers joined in a sale of the business and good will of the firm, the purchase price being payable in ten (10) one-half yearly instalments, each of which was to be a sum equal to a certain percentage of the net commissions earned by the purchasers of the business. We quote:

"This summons has been issued for the purpose of having it determined how the amounts already received in respect of the period subsequent to the testator's death and the instalments hereafter to be received ought to be treated as between the widow and those interested in the corpus of the residuary estate * * * each instalment is a debt of an uncertain amount payable at a future date * * *. (p. 96).

"In my opinion each instalment of purchase money already received and hereafter to be received, with or without interest, ought as from the testator's death to be apportioned between corpus and income by ascertaining the sum which put out at interest at four per cent (4%) per annum on September 12, 1917, (date of death) and accumulating at compound interest calculated at the rate with yearly rests and deducting income tax would, with the accumulation of interest, amount, on the day when the instalment was or shall be received,

to the amount actually received, including interest, if any, and the sum so ascertained must be treated as capital and the difference between it and the sum actually received as income. (p. 97).

"These instalments are of wholly uncertain amounts and in the meantime producing no income * * * and it is obvious that the amount which could be realized by immediate conversion is of a very uncertain and speculative character. In these circumstances it is for the benefit of all parties interested in the corpus of the estate that conversion should be postponed and that the agreement for sale should be worked out, but this result ought not to be allowed to prejudice the tenant for life, and in my opinion the case falls within the principle settled in Wilkinson v. Duncan, applied in Beaven v. Beavan, and followed in re Earl of Chesterfield's Trusts."

Somehow the appellants have overlooked the view they once entertained, and the prayer of their amended answer, that the way to arrive at an apportionment of the rents from the Mokuleia lease, would be *wait* until the expiration of the lease and then apply the method we now say is the proper method when looking back, with definite figures to work with.

(See Tr. pp. 27-28)

THE ERRORS ASSIGNED.

It is submitted that the errors assigned as numbers 1 to 6, and error 8, are all covered by our foregoing argument, and amount to nothing if it is held, as we contend that the testator gave to the life tenants the "rents" from his *leaseholds*. Errors 1 to 4 are doubly

covered on account of the discretionary feature of the will as to the Mokuleia property.

Error 7 involves the question of apportionment of the "rents" between corpus and income if apportionment is held necessary to those from the Ookala lease, and is covered by the chapter on "Apportionment of Rents".

Errors 10 to 16 inclusive are "general" and need not be considered. They are mere consequences, dependent upon those preceding. None of them are separately presented or discussed in appellant's brief.

General assignments, that the court erred in finding for one party or the other, or failed to find for one party or the other, cannot be considered.

See Doe v. Waterloo Min. Co., 70 Fed. 455;
U. S. v. Ferguson, 78 Fed. 103;
U. S. v. Lee Yen Tai, 113 Fed. 465.

CONCLUSION.

It is urged:—

1. That *both* leases are controlled by the testator's provision for payment to his wife and children of the *"rents,* income, issues and profits arising from and out of" his "trust estate", showing that the life tenants were to enjoy the leases in specie. Therefore, if the decision appealed from is wrong because such was his intent, so expressed, in the light of the whole case, and if, in consequence, there should be no apportionment of the Ookala rents at all, then any decree of apportionment is *wrong,* and this will warrant the Court in

setting that decree aside, as wrong in toto, in which case the whole Ookala rents belong to the life tenants.

2. That the Mokuleia lease is different in any case, and was not to be converted, on the strength of the discretionary feature alone.

3. That if the Ookala rents have to be apportioned at all, they have been correctly apportioned by the court below.

Respectfully submitted,

WILLIAM O. SMITH,

LOUIS J. WARREN.
Attorneys for Life Tenants, Appellees.

Service of the foregoing brief and receipt of a copy is hereby acknowledged this.....day of May, 1923.

.....
Guardian ad litem and
Attorney for Appellants.

.....
Counsel for Trustees, Appellees.

No. 3989

United States
Circuit Court of Appeals
For the Ninth Circuit.

EVA GAY, et al, Minors, by Guardian ad Litem,
Appellants,

vs.

H. FOCKE, et al,
Appellees.

Brief of Counsel for Trustees

Upon Appeal from the Supreme Court for the Territory of Hawaii.

WILLIAM L. STANLEY,
Attorney for Trustees—Appellees.

Filed this ..... day of May, 1923.
F. D. MONCKTON, Clerk.

By.....Deputy Clerk.

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INDEX

No. 3989

United States
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EVA GAY, a Minor, BEATRICE GAY, a Minor, SONNY JAMES MOKULEIA GAY, a Minor, MICHAEL VANATTA K. GAY, a Minor, LLEWELLYN NAPELA GAY, a Minor, ALBERT GAY HARRIS, a Minor, WALTER WILLIAM HOLT, a Minor, ALICE K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor, by HARRY EDMONDSON, Their Guardian ad Litem,

Appellants,

vs.

H. FOCKE and H. M. von Holt, Trustees Under the Will of the Estate of JAMES GAY, Deceased, and LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY, ALICE MARY K. RICHARDSON, HELEN FANNY GAY and FRIDA GAY,

Appellees.

BRIEF OF COUNSEL FOR TRUSTEES

STATEMENT OF CASE

The Trustees, Appellees in the above cause, as Trustees under the will of James Gay, late of Waialua, deceased, filed their bill in Equity in this cause joining as parties respondent the children (hereinafter called the life-tenants) and the grandchildren (hereinafter called the remaindermen) of the said James Gay, praying for a construction of his last will and testament and asking the court for instructions as to their duties under the said will, and the cause comes to this court on the appeal of the remaindermen from a decree of the Supreme Court of the Territory of Hawaii, entered on the 8th day of March, 1922.

As will be shown later the construction to be placed upon the will depends largely upon the question whether the will does or does not fall within a rule of construction of ancient authority in the English courts and known as the "rule in Howe vs. The Earl of Dartmouth". Very few authorities on the application of this rule are to be found in the American reports and, as in the courts below neither counsel for the life-tenants nor for the remaindermen went at any great length into a review of the numerous English authorities, counsel for the Trustees has deemed it to be his duty to examine those authorities and to present this brief thereon with the sole purpose of assisting the court in arriving at a correct construction of the will.

THE FACTS.

Counsel for the life-tenants and remaindermen have

substantially presented in their briefs all of the facts disclosed in the Statement of Evidence (Record 120-147), and it is unnecessary to repeat them at length here. Those facts include:—

The circumstances surrounding the testator at the time of making his will (May 25, 1893) and at the time of his death (three days later), the then condition of his estate and the amount and character of his property, the condition of his family and his relationship to the objects of his testamentary disposition.

The testator left surviving him his widow and seven children, the youngest at the time of his death being three or four years old and the eldest about sixteen.

He owned no real estate—a fact, as the authorities later cited herein show, of great importance in this case.

The principal assets of the estate consisted of (1) household furniture, farm implements, etc. (2) several hundred head of cattle and horses (3) a leasehold at Mokuleia, having an unexpired term of some forty years (4) a contract (hereinafter referred to as the Ookala lease) with the Ookala Sugar Company under which the estate was entitled for a term of some seven years to a percentage of the sugar grown and manufactured by that company on lands held by the testator under a lease from the Crown Land Commissioners. All of the above assets are what is known in law as *perishable* or *wasting* assets.

Of these assets items (1) and (2) were combined by the testator with a portion of the land at Mokuleia (Item 3) as the basis of his business as a rancher and

stock raiser, and other portions of Item (3) were sublet by him to others for the cultivation of rice, etc. The gross subrentals derived from the Mokuleia lease were $2,723.50, out of which was payable a head rent of $1,250. The net rent from the Ookala lease in the year preceding the testator's death was about $600.

To the effect that testimony of the above kind should be considered on the construction of a will when the language is not plain or the meaning obvious, see:—

Blake v. Hawkins, 98 U. S. 315;
Chambers Est. 183 N.Y.S. 526;
In re Kellerman's Will, 11 N.Y.S. 139;
Herring v. Williams, 69 S.E. 140;
Macey v. Oshkosh, 128 N.W. 899.

In McCorn v. McCorn, (N.Y.) 3 N.E. 480, parol evidence was permitted that a testator had no personal estate out of which legacies could be satisfied, in order to show an intention that they should be charged upon the realty, the court saying (pp. 480, 481):

"The will was made one day before his (testator's) death so no change in the condition of his estate can be supposed as occurring in the interval. The testator must have known that he had no personal estate . . . The situation is such that all possibility of innocent mistake is removed, and the facts drive us to the alternative of believing that the testator, in making his will under the solemnity of approaching death, indulged in bequests known to be useless and vain, or meant that they should be paid from the only possible source. No reasonable intelligence can hesitate to draw the latter inference."

See also Turner v. Gibb, et al (N.J.) 22 Atl. 580, 581;

"The fact that the testator *must have known* that the personal estate was not sufficient to pay all the legacies is to be considered in ascertaining his intention to charge them on the land, and raises a strong presumption that such was his purpose."

See also Briggs v. Carroll, 22 N.E. 1054, 1055:

"We are very far from saying that a residuary clause, blending in its form of disposition both real and personal estate will produce a charge upon the former for the payment of legacies wherever the personal estate proves insufficient. No such doctrine can be justified. *The deficiency must exist when the will is executed* and be so great and so obvious as to preclude any possible inference that the testator did not realize it, or that he may have expected and intended before his death to remove the difficulty." Parol evidence was admitted to show the existence of this deficiency.

In the appellants' brief (p. 16) it is argued that extransic evidence was not admissible in the present case because, "here, until the property of the deceased was known, no question could have arisen" and that "the words of a will, the meaning of which is clear, cannot be changed nor can such meaning be altered by knowing what the property consists of." In the cases McCorn v. McCorn, Turner v. Gibb, and Briggs v. Carroll, supra, no question could have arisen until the deficiency of personalty was known, and yet parol evidence was held admissible to show the existence of the deficiency as a result of which the questions arose. In this case the lack of realty is one of the factors

ner on Wills, 388, 389; Page on Wills, 988; Schouler on Wills, 581; Jarmon on Wills, vol 1 (6th Ed.) 400-402; Meyers vs. Maverick, 28 S. W. 716." . . . .

"It is also said that while the intent 'must be ascertained from the meaning of the words in the instrument and from those words 'alone', yet, as the testator 'may be supposed to have used language with reference to the situation in which he was placed, to the state of his family, his property, and other circumstances relating to himself individually and to his affairs, the law admits extrinsic evidence of those facts and circumstances, to enable the court to discover the meaning attached by the testator to the words used in the will, and to apply them to the facts of the particular case.' " . . .

"It is of course elementary that all parts of the instrument must be construed together, and the intention of the testator be arrived at by considering the whole, and not from detached, segregated, and isolated words, sentences, or clauses."

The Statement of Evidence also contains facts showing the conduct and management of the estate by the trustees, and a partial statement of their receipts and disbursements from the date of the reception of the trust to the filing of their bill for instructions. This shows that the income has, owing to circumstances which could not possibly have been foreseen by the testator, (e.g. that his ranch would become the site of a vast sugar estate), grown to very large proportions compared with that which the testator's property produced in his life time. Great stress is laid by the appellants upon the large income of the estate, whereas the fact of this increase *subsequent to the testator's*

death can have no bearing on the construction to be placed upon his will. Such evidence was, and could only be, introduced with a view to the statement of an account in case it were decided that the Trustees were not justified in distributing, as they have done, all of the income received by them to the life tenants. On the question of the construction of the will the only extrinsic facts which can be considered are those which in the nature of things could have been presented if the present bill had been brought when the trustees first assumed their duties, viz.: circumstances surrounding the testator at the time of making the will and at the time of his death. The general rule is that a will must be interpreted as far as possible from the standpoint of the testator, and it must be obvious that events not anticipated by him can throw no light on what his intentions were, or on the question as to how his will should be construed.

One allusion,—in fact a flat statement,—is made in appellants' brief, that is not correct. On page 11 occurs the expression "less certain counsel fees allowed in this proceeding which have been paid out of corpus". The order of the court as to counsel fees is not in the record. We can only meet the statement by going outside of the record, as appellants have done in making it, and say that the order apportioned counsel fees between corpus and income in the same proportion as the rents were apportioned.

THE WILL.

The testator after appointing executors and trustees, and directing the payment of his debts and funeral expenses, gave, devised and bequeathed *"all his estate, real, personal or mixed and wheresoever situate"* in trust nevertheless for the uses and purposes hereinafter set forth, that is to say:—

1. "To pay the *rents* income issues and profits arising from and out of my said estate to my wife Mary Ellen Gay for the term of her natural life, and to be applied by her for the support of herself and the support maintenance and education of my children born of the body of my said wife Mary Ellen."

2. "And from and after the death of my said wife I direct my said Trustees Herman Focke or his successor in said trust to pay the *rents,* income, issues, and profits arising from and out of said Trust estate as follows: one half thereof for the support and maintenance of my sons Llewellyn Napela Gay, Reginald Eric Gay and Arthur Francis Gay share and share alike; and as to the other part thereof to pay the same for the support maintenance and education of my daughters Alice Mary K. Gay, Ethel Pauline N. Gay, Helen Fanny Gay, and Frida Gay, share and share alike."

3. "And from and after the death of all my children born of the body of my said wife Mary Ellen I direct my said Trustee or his successor to convey one half of *said trust estate and all additions or increases thereto,* unto the children of my sons (naming them as before) share and share alike and the child or children of any deceased child to take the parent's share. And as to the remaining portion of *said Trust estate and all additions or increase thereof,* I direct my said Trustee or

his successor in said Trust to convey the same unto the children of my said daughters (naming them as before) share and share alike, and the child or children of any deceased child to take the parent's share."

Then followed a direction that the Testator's trustees should pay the share of the income belonging to any deceased child to the heirs that might survive such child who should die.

Then follows a power of appointing new trustees; and the Will continues:

4. "*It is my wish and I hereby direct* that my said Trustees or their successors or successor, shall manage, conduct and carry on the business of ranching and stock raising at Mokuleia on the Island of Oahu, so long as it can be done so, profitably, and without loss;

5. "And I hereby EMPOWER them or their successors or successor at any time when in their discretion they think that a sale of all the property at said Mokuleia, would by a reinvestment of the money realized from such sale of said property be beneficial and inure to the benefit of or increase the Trust Estate created under this Will, to sell and convey the said property at Mokuleia free and barred of the Trust created by this Will."

It will be seen that the trusts expressed in the paragraphs numbered above 1, 2, and 3, were to pay the "*rents,* income, issues and profits" of the trust estate to testator's wife for life; on her death to pay the "*rents,* income, issues and profits" to his children for life, and on the death of the last survivor of them to convey "*the said trust estate and all additions or increase thereof*" to his grandchildren.

The Trustees in the conduct of the ranch used the rents accruing from the leases, the widow and family receiving the net profits, and after 1906 paid the net *rents*, including income derived from subleasing to the life tenants, on their understanding that this was what was meant by the testator when he disposed of the "rents, income, issues and profits" of the trust estate.

The question was raised by present counsel for the trustees as to whether under the terms of the will their procedure in the past of paying all of the net *rents* to the life-tenants was justified in view of the clause in the will directing the conveyance of the "trust estate with all additions or increase thereto" to the grandchildren on the death of the life tenants, and the fact that if the trustees continued to hold the Mokuleia lease and pay all the income therefrom to the life tenants the lease would become exhausted (as had already occurred in the case of the Ookala lease) and nothing be left for the remaindermen.

RULE IN HOWE VS. DARTMOUTH.

The above question presented itself to counsel in consequence of a long established rule of construction in the English courts of chancery, adhered to in the case of Howe vs. The Earl of Dartmouth in the year 1802 (7 Ves. 137) and known ever since by the name of that case.

The case was decided in 1802. The terms of the will were very simple and concise. The testator left *all his personal and landed estates* to his sister for life, and then over. The will contained no indication whatever

of the intention of the testator as to how or in what manner the estate was to be enjoyed. It was a simple case of a gift to one for life, with remainder over. No discretionary power was vested in the trustees to retain any of the investments in the state in which they existed at the death of the testator, and there was no language in the will indicating any intention of the testator that they should so remain.

The rule, with its qualifications, has been expressed in numerous cases as follows:

> "I take it to be the rule of the court that when a testator has given an estate or the residue of an estate to persons in succession, as to one for life with remainder to another person, the court, presuming that the testator intended that the remainderman should have something, will so deal with the property, if it be a property that is wearing out and may terminate during the life estate, as to secure the accomplishment of that intention and give the remainderman something * * * * for that purpose it will convert the personalty into a permanent investment. That is the rule; and the court only acts upon the *general intention* of the testator that something should be given to the person who is the donee in remainder *But* if upon construction of the will it appears that the testator had *another intention,* that is to say, an intention to give one or more persons who are to take for lives, or during a succession of lives, the enjoyment of the property in the state he left it at the time of his death, then the court will carry that intention into effect, and every case which can arise will turn upon this question of construction, whether you

intention is to be found in the will, *and considering it quite as well settled* as Howe vs. Dartmouth itself is, that when you find an indication of intention that the property is to be enjoyed in its existting state, it shall be so enjoyed, I think that justice could not be done if the principal of Howe vs. Dartmouth were applied to the circumstances of such a case".

Pickering vs. Pickering, 4 Myl. & C. 289.

PROPOSITIONS PRECLUDING APPLICATION OF RULE

In the case at bar the testator devised and bequeathed to his trustees "all his estate, real personal or mixed, and wheresoever situate" upon trust to pay the "rents, etc." to his wife for life; from and after her death to pay the "rents, etc." for the support and maintenance of his sons and for the support, maintenance and education of his daughters; and upon the death of the last survivor of his children to convey the "trust estate with all additions and increase thereto" to his grandchildren.

The will in the case at bar contains NO TRUST FOR CONVERSION.

The trustees were DIRECTED to continue the testator's ranch business and the will gave them a DISCRETIONARY POWER OF SALE. There was no mention of the leaseholds in the earlier clauses of the will, but distinct reference was made thereto in the clauses directing the conduct of the business at Mokuleia and authorizing a sale of *all the property* at Mokuleia.

Premising that the applicability of the Howe v. Dartmouth rule in any case depends upon the particular

circumstances of the case, and the weight to be given to the expressions contained in the will, it is submitted that the authorities examined (which include:—Halsbury on the Laws of England, Vol. 14 p. 283 et seq, Vol. 28 p. 31, 32, 129 and cases cited in notes; 3 Pomeroy's Equity Jurisp. 14th Ed. Sec. 1168 et seq. and cases cited in notes; White & Tudor's Leading Cases in Equity; Lewin on Trusts, pp. 297 et seq; Perry on Trusts, Secs. 448 et seq; 1 Jarman on Wills (6th Ed) pp. 604 et seq, and practically all of the English decisions on the question referred to in the various cases and text books) fully sustain the following propositions excluding the application of the rule to the will of this testator:—

(A). Absention from conversion is required where in a will there are specific directions as to the disposition of the income of the property devised or bequeathed and, while the use of the word "rents" does not rebut the presumption of conversion in a case where an estate consists of *both leasehold and freehold,* where there is *no freehold* the use of the word "rents" is a strong indication that leaseholds are to be enjoyed in specie and the life tenant is entitled to the actual rents produced by them.

Bowden vs. Bowden, 17 Sim. 64.

In this case the testator gave all his leasehold estates and all other his estate and effects to trustees for the benefit of his wife, his daughters, and the children of the latter, in succession; and, in declaring the trusts

he used the terms "rents, issues, dividends and annual proceeds; he *empowered* the trustee to sell his leasehold estates and to invest the proceeds on mortgage of freehold or other leasehold estates and to lease any part or parts of the said estates. Counsel for the widow insisted that the leaseholds be sold and argued that the will clearly showed that the testator meant his leasehold estate, which was the principal part of the trust property to be so dealt with that his grandchildren might have the benefit of it. The respondents relied on the frequent use of the word "rents" and on the *power of sale* in the will, as showing that the testator had not made *obligatory* upon his trustees to convert the leaseholds into money. The Vice-Chancellor held that the leaseholds were not to be sold.

Burton vs. Mount 2 De G. & Sm. 383.

In this case the testator gave all his "estates and effects, both real and personal" upon trust to pay the rents, issues, profits, dividends and interest thereof to A for life, with remainder over, and *empowered* his trustees at any time or times, or from time to time, *at their discretion,* to make sale and dispose of the freehold and leasehold estates or any of them. The Vice-Chancellor held against conversion of the leaseholds, stating:—

> "Upon the weight of authority, and upon my own opinion independently of authority, I think the tenant for life right in his contention as to the leasehold property—that it should not be sold."

See also:

Hinves vs. Hinves, 3 Hare, 609.

Vachell vs. Roberts, 32 Beav. 140, 142.

In the latter case the testator devised and bequeathed "all his real and personal estate whatsoever and wheresoever" on trust to permit A. to receive and take the rents, issues and profits for life, with remainder over as to the said real and personal estate. It was held that the word "rents" would refer to and include both the leasehold and freehold.

See also:—

Crowe vs. Crisford 17 Beav. 507, to the same effect. Both of the last named cases, in which the estates consisted of both freehold and leasehold, have been disapproved in the case of *Re Wareham.* (1912) 2 *Ch. Div.* 312. In this case the language of the court was as follows:—

> "I agree with Kindersley V. C., (Craig vs. Wheeler, 29 L.J. (Ch) 374) that where a testator has *both freehold and leaseholds,* the *mere use* of the word "rents" is not an indication of intention that the property is to be enjoyed in specie, inasmuch as the use of that word can be satisfied by applying it to the freeholds. The testator had real and leasehold property, and the reference to "rents, issues and profits" is not sufficient indication to outweigh the general rule that the tenant for life is not to receive the whole of the rents of the leasehold property, *seeing that there is real estate* to which the words "rents" may be referred".

See also: *Re Game* (1897) 1 Ch. Div. 881, cited in above case.

In this case it was held that as the residuary estate included *both freehold and leasehold property,* neither

the use of the word "rent" nor the power of distress given in the will were sufficient to take the case out of the Howe vs. Dartmouth rule "as the use of the word "rents" and the power of distress would be satisfied by applying them to the freeholds".

Goodenough vs. Tremamando, 2 Beav. 512.

In this case the testator gave the residue of his estate and effects to trustees upon trust to permit "the rents, issues and profits thereof" to be received by his son for and during the term of his natural life and after the latter's decease to the testator's granddaughters when they attained the age of twenty-one, with power after the death of the son to apply the "rents, etc." towards the maintenance and education of the granddaughters until their shares should become vested. It appears from the decision that the will was not executed so as to pass *real estate,* and a part of the testator's property consisted of a leasehold. It was urged that if no conversion took place there would be little chance to those in remainder of receiving any benefit from the leasehold property. The Master of the Rolls said that he could not declare this to be a paper conversion "without striking out the word 'rents' which was twice repeated in the will," as it appeared that *there was no other property except the leasehold to which the term "rents" was applicable.*

See also Pickering vs. Pickering, 4 Myl. & Co. 289. The last case is generally cited as a leading authority for the proposition above advanced.

Blann v. Bell, 2 De Gex, M. & G. 775;

Cafe vs. Bent, 5 Hare, 24;

In this case the Vice-Chancellor said:—

"I think the cases of Pickering v. Pickering and Goodenough v. Tremamando are the authorities for putting a more precise construction on the word "rents", and for holding that this will carries intrinsic evidence that the testator contemplated the enjoyment in specie of the leasehold in question."

The case of Pickup v. Atkinson, (1846) 4 Hare 624 is the only case that counsel for the trustees has been able to find in which, there being no freehold, a court has held that the lease should be converted. After a specific bequest of certain leasehold houses, to the testator's wife for her life, with remainder over to his nephew, the testator bequeathed "the rents, profits, dividends and interest" of all the residue of his property to his wife for her life, with a gift over of the whole of the residue after her decease to other persons. It was held that the widow was not entitled to the enjoyment in specie during her life of that part of the residue which consisted of leasehold and other perishable property, but that the same ought to be converted. The court in its decision speaks as follows:—

"Admitting that the word "rents" as it occurred in the will may be *material in connection with other circumstances,* the question first to be considered is whether that word *alone* is in this case sufficient evidence of the intention which the tenant for life ascribes to the testator. My opinion is against such a conclusion . . The conclusions (reached by the court) appears to me to be put beyond dispute when it is considered that the words "rents, etc." in this case mean "rents, etc", not

of the property then had, but of such property, real, personal and mixed, as he might happen to have at the time of his death. The same conclusion arises from the words of the gift over, namely: "the whole of such residue of such property" * * * * . In Pickering vs. Pickering the word "rents" occurred but it does not appear to me that the word was relied upon as alone constituting a ground for preserving the property in specie. There are other and very elaborate reasons given for that conclusion. In Goodenough vs. Tremamando the word "rents" occurred twice, and Lord Langdale appears to have thought that the use of it the second time was conclusive evidence that the testator treated his property as unconverted when the estate in remainder fell into possession, and therefore that the legacy was specific in the direct sense of that term. *And he says further that there was no other property* belonging to the testator, *except the leaseholds,* to which the terms "rents" was applicable, which shows that he considered the bequest as specific in the strict sense of the term. * * * * * * * * *In this case* any property, freehold or leasehold to which the testator *might have been entitled at his death* would satisfy the gift; and that in my opinion shows that *the testator could not have had any particular object in his mind to whic hthe direction was applicable,* but that he referred to the income of his property generally".

In the case at bar there is intrinsic evidence that the testator had particular objects in mind for he referred particularly to his business and property at Mokuleia—all leasehold property. There is the further fact to be borne in mind that as the will was executed three days before his death he was disposing of the property

which he actually had and that he was not thinking of freeholds which he might subsequently acquire and have at the time of his death.

Hood vs. Clapham, 19 Beav. 90.

In this case the testator had both freehold and leasehold property. By his will he gave "all his freehold, copyhold and leasehold estate and all other his real and personal estate" to trustees upon trust to get in all money due to him on "mortgages, bonds or other securities and rents" and after payment of debts and legacies to lay out the residue in the public stocks or funds; and as to one-half of his freehold, copyhold and leasehold estates, and all the trust moneys, stocks, etc., and all other his real and personal estate upon trust to pay the "rents, dividends and annual income to A for life, and he declared that after the decease of A, the INHERITANCE AND CAPITAL of such half part should be held in trust for her children. There was a similar trust as to the other half. It was held that annuities, furniture, etc., forming part of the testator's estate should be converted, but that (semble, from the use of the word "rents") *the leaseholds were to be enjoyed in specie,* the court saying that the leaseholds were expressly given to the tenants for life for their lives.

There are two cases: Chambers v. Chambers, 15 Sim. 183; and Morgan v. Morgan, 14 Beav. 72, which are sometimes cited in opposition to the rule that where there are only leaseholds the use of the word "rents" does not indicate that the leaseholds are to be enjoyed

in specie, but it is to be noted that in each of them *in the language of the trust* the word "rents" was confined to the freeholds. In each case there was a separate devise of the testator's real estate to trustees on trust "to pay and apply the rents" for the benefit of a person, with remainder over; there then was a separate bequest of the residue of the estate to trustees with directions to apply "the whole of the income" thereof to such person, with remainder over of all the "said residuary estate and effects". In Morgan v. Morgan it was held that the tenant for life was not entitled to the enjoyment of the leaseholds in specie, there not being sufficient to indicate that a conversion should not take place—"the word *"rents is used but it is confined to the freeholds."* The court says:—

> "There is certainly a great variety of cases, where the court has laid hold of various small expressions as indicating the testator's intention that the property was to be enjoyed in specie, but all or nearly all of them I think referable to a particular mode of management of the property for payment out of it which management or payment could not take place unless the property remained unconverted. * * * There are other cases where the *testator has expressly referred to the property by name as unconverted*, or has described his property *as remaining in the manner in which it was situated when he died.* These cases have no reference to the present, *as the will contains no such expression."*

The case of Mills v. Mills (1835) 7 Sim. 501 is cited by the life tenants for other purposes. In this case,

which, so far as counsel for the trustees can learn, stands alone, the testator gave all his freehold and leasehold messuage lands and hereditaments and all other his real and personal estate in trust "to pay the *rents* of his *freehold* and *leasehold* estates" and the dividends, interest and proceeds of his money and other his personal estate to his daughter for life, and after her death in trust "out of the *rents* and profits of his said *freehold* and *leasehold* estates" and the dividends, etc., to pay an annuity to her husband, and subject thereto to stand possessed of his said freehold and leasehold estate, moneys, etc., for the children of his daughter, and in default of such children to the Corporation of S. in trust "to sell his *freehold* and *leasehold* estates", and sell, collect and call in his personal property, and lend the proceeds to certain persons upon the terms mentioned in the will.

In a suit brought on behalf of the grandchildren *it was held that the leaseholds should be converted.* The reason given for the decision was that no portion of the personal estate was given *specifically,* a distinction which the authorities show has long become obsolete. Certainly it would appear that by the extension of the rule in Howe vs. Dartmouth to this case the expressed intention of the testator was defeated.

For other cases in support of the general proposition advanced above, see

Collins vs. Collins, 2 Myl. & K. 702,

Skirving vs. Williams, 24 Beav. 270.

(B) Where there is no trust for conversion, an express power to retain existing investments is sufficient to exclude the application of the rule in Howe vs. Dartmouth, and a tenant for life has the right to enjoy the actual income from the investments.

Gray vs. Siggers, 15 Ch. Div. 74.

In this case a testator gave his real estate and all the residue of his personal estate, including several leasehold houses held upon short terms, to trustees upon trust to pay and apply the annual income to his wife for life, remainder over to his grandchildren. He *empowered* his trustees to retain all or any portion of the trust estate in the same state in which it should be at his decease, or to sell and convert the same at such time, etc., as the trustees should in their discretion think fit. It was held that the special power to retain existing investments took the case out of the general rule as to conversion of personal property. The language of the decision (Malins, V. C.) was in part as follows:—

> "If this question had rested only *upon the first part of the will* in which the testator gives his estate in trust to pay the annual income to his wife for life, and after his death to divide it between the grandchildren, then it is perfectly clear that all perishable property such as leaseholds must have been converted for the benefit of all parties interested, so that the wife would have had the life income and the capital would have been preserved for the grandchildren. That would have come strictly within Howe vs. Dartmouth and also Mc-

Donald vs. Irvine (1878) (8 Ch. Div. 101), where there was NO DISCRETION, NO POWER, NO RESTRAINT. But the testator having given all his property to his wife for life, without adding any words to show that the property was to be held in the state in which it had drifted at his death, adds this very precise declaration:—(quoting power of trustees to retain property) so that they have the most absolute power of selling, if they think fit, and of retaining, if they think fit; retaining for the purpose of enabling the wife to have the same income, and the same enjoyment from it that the testator himself had. Therefore, *the case is entirely taken out of Howe vs. Dartmouth,* and *McDonald vs. Irvine,* because of this power which gives the trustees the right to retain the property in specie. * * * *

I cannot look at the question whether the leaseholds are for long or short terms, because whether long or short the widow is to have the property in specie if the trustees thought fit to retain it. THEN LOOK AT THE PROBABILITIES. This testator was a small tradesman. He was of miserly habits and made his money chiefly by discounting bills. His property consisted of Spanish and Mexican bonds and a considerable amount of leasehold property. *If the leaseholds were sold, his wife, instead, perhaps, of getting £100 a year, might not have more than £20 a year. I thing he intended, if the trustees saw fit, that she should enjoy the property in specie just as he was enjoying it".*
Counsel then remarked that he thought the Vice-

Chancellor would be glad to learn that his predecessor had decided in the same way the case of Simpson vs. Lester, 4 Jur. N. S. under a like power in the same way.

In re Bates, (1907) 1 Ch. Div. 22.

In this case the court said:

> "The discretionary power to retain the investments for a time is inconsistent with an obligation to convert, for if they have the right to retain for such period as they think fit, they may retain for five years, or indeed may never convert at all; and if so, they are only exercising the discretion given them by the will. If they do that they cannot convert, and more than that, the testator by giving this discretion, has stated in plain and clear language, that they are not bound to convert. If they retain they exclude the operation of the rule."

In re Nicholson, (1909) 2 Ch. Div. 111.

In the above case the testator by his will appointed three trustees and gave them all his real and personal estate not otherwise disposed of. He directed certain legacies to be paid and the will then proceeded as follows:—

> "I direct that all the rest and residue of my real and personal estate and the property so given to my trustees as aforesaid upon trust (*hereinafter called my residuary estate* and property) shall be *invested* by my trustees and I desire them to pay over the interest, dividend and income thereof to my said wife during her life."

He also directed that after his wife's death *"such*

residuary estate" should be distributed among different persons. He then towards the end of his will gave his trustees the following power:—

> "I authorize and empower my trustees at their discretion to sell and convey all or any part of the said real estate and to collect and get in all or any part of my personal estate or to permit it to remain on investments the same as those in which it may be invested at the time of my death".

The syllabus of the case is as follows:—

> (1) Where a will contains *no* trust for conversion and the tenant for life of the residue is given the entire income thereof, he is entitled to the income of the unauthorized securities retained by the trustees under a power of retainer whether the securities are of a permanent or *wasting* nature.
>
> (2) There is no distinction for the purposes of the application of the rule in Howe vs. Dartmouth between unauthorized securities of a wasting and those of a *hazardous* nature.

At the time of the testator's death, his estate was invested in a number of securities which included many which were unauthorized as trustees' investments.

One of the investments was in shares of a limited company unauthorized for trustees' investment and the court said:—

> "For the purposes of what I am about to say, I think it is better for me to assume that it is a wasting security, it being admitted that so far as the unauthorized securities generally are concerned,

the tenant for life is entitled to the actual income arising from them.

"The contention of the remainderman is that the true effect of what we lawyers call the rule in Howe vs. The Earl of Dartmouth, (7 Ves. 137) is that you must *presume* that, if a testator gives in general terms personal estate to be enjoyed by several persons in succession, he means what he says, and that, if part of the personal estate consists of items of property which are of a wearing out nature, the only way in which the testator's intention that they should enjoy the estate in succession can be carried out is by converting the whole estate or by treating it as converted into an authorized form of investment, and then paying the tenant for life the income of the authorized investments representing the estate when so converted. *The rule only means* that the court will *assume* that by the gift of the personal estate to several persons in succession the testator intended that the whole of his estate should be converted, that being the only means by which in the case of wasting property the several persons would be enabled to enjoy it in succession. *What the court has to see is whether on the will with which it has to deal it is to say that the conversion to which I have alluded is to take place.*

In the present case the will contains *no trust for conversion.*

The estate itself is given to trustees upon trust to invest and pay the income of the investments to the tenant for life. The trust to invest there, having regard to what comes afterwards in the will, must mean to invest such *moneys* as the trustees

might properly have in their hands, arising either from the collection or falling in of the personal estate, or the conversion of investments which under the power subsequently given they may convert. *It cannot mean* to convert the whole of the estate in whatever condition it might be at the testator's death. The powers given by the will are absolute, discretionary and alternative to convert the estate or to permit it to remain in the same state of investment as at the testator's death. If, therefore, the *testator has said* that his trustee may retain any part of his estate in the same state of investment as at the time of his death, and if an investment at his death consisted of what is called a wasting security, *how can I say* that, as between tenant for life and remainderman, he intended that a particular investment should be converted into money? *He* has said that it may be retained, or in other words that in the case of wasting securities, if retained by his trustees in the proper exercise of their discretion, *the persons entitled in remainder are to take their chance of the tenant for life dying during the continuance of the security*".

The court then cited with approval *Gray vs. Siggers,* (1872) 15 *Ch. Div.* 74, and *In re Bates,* (1907) 1 Ch. Div. 22, and declined to follow *Porter vs. Badderly,* (1877) 5 Ch. Div. 42, and held that there was no distinction to be made between *hazardous* and *wasting* securities, the distinction which had been made in Porter v. Badderly.

(C) If there be no trust for conversion, and the instrument creating the trust expressly gives to the

trustee a discretionary power of sale—a discretion as to conversion or non-conversion—he may exercise it by refraining from conversion in *spite of one cestui que trust, being thereby benefited at the expense of another.* With such an exercise of discretion a court of equity does not interfere, and until conversion the tenant for life has the right to receive the actual income.

> "If a testator negatives a sale at the time of his death by authorizing or directing conversion at a subsequent period, or if he uses any other expressions which assume leaseholds or stock to be unconverted when by the general rule it would be converted, the doctrine of conversion is excluded".
>
> Lewin on Trusts, page 299.
>
> Re Sewell's Estate, L. R. 11 Eq. 80.
>
> Thursby vs. Thursby, 19 Eq. 395 (reviewing a large number of authorities.
>
> Gray vs. Siggers, (supra)
>
> Re Pitcairn (1896) 2 Ch. Div. 199.

In the case last cited the language of the court is in part as follows:—

> "The testator has the right to say what is to be done, and his intention as expressed in or to be deduced from the terms of his will must be carried out. *But if he has given no direction on the subject, the court applies its own rule.* * * * * * * * In my opinion the power given to the trustee to sell and dispose of the estate "if and when they shall consider it expedient" means that they are to have the power of selling and disposing of it *if* they think it expedient and when they consider it

expedient, and if they have power to do this they necessarily have power not to do it. If they have the power to sell if and when they think fit, then they necessarily have power not to sell unless they think fit, and that in my opinion amounts to an express power to the trustees to convert or not, as they think fit. * * * It seems to me that several authorities show that, when a testator has directed that the conversion of his estate shall take place at some time other than that at which the rule of the court (Howe vs. Dartmouth) would make conversion necessary, *the rule of the court has no application* * * * * when it is left to the discretion of someone else to say when the sale is to take place, *the testator himself having provided for the sale,* there is no rule of the court which requires that the sale to be made in a different way or under different circumstances."

Sherry vs. Sherry, (1913) 2 Ch. Div. 508.

Green vs. Britten, 1 De G. J. & S. 649.

Brown vs. Gellatly, L. R. 2 Ch. App. 751.

Re Leonard, Theobald vs. King (1880) 29 W. R. 234, cited in note to same effect in Vol. 28, Halsbury, Laws of England, pages 31 and 129.

Where, however, there is a trust for conversion, with a power of postponement, it seems that the life tenant is not entitled to the actual income pending conversion.

In re Chaytor, (1905) 1 Ch. Div. 233.

Yates vs. Yates, (1860) 28 Beav. 637.

(D) According to the modern doctrine the question of the application of the rule does not depend on the legacy or bequest being specific or not.

1 Jarman on Wills (6th Ed.) page 607.

Alcock vs. Sloper, 2 Myl. & K. 699.

In the latter case it is stated by the court that:—

"In the case of Howe vs. Dartmouth some confusion arises from the use of the term "specific legacy" in the judgment, general personal estate being at all times fluctuating; until the death of a testator there can be no specific legacy of general personal estate".

Pickering vs. Pickering, 2 Beav. 58; 4 Myl. & Cr. 289.

In this case the court says:—

"There is an obscurity which frequently arises in these cases, from the use that is made of the term "specific legacy"; when the word "specific" is used on such an occasion as this, I do not think it is used in the ordinary sense in which "specific" is applied to a legacy. It is used to this extent only, that the property is to be specifically enjoyed.

McDonald vs. Irvine, 8 Ch. Div. 101.

Hinves vs. Hinves, 3 Hare 609.

Hubbard vs. Young, 10 Beav. 203.

(E) Where a trustee is given mere authority to convert in his discretion, without the *imperative duty* of doing so, there is no equitable conversion.

1 Perry on Trusts, Sec. 448 and cases cited in Note 1.

3 Pomeroy Eq. Jurisp., Secs. 1159 et seq.

Cases in which rule Howe vs. Dartmouth has been applied:

The cases, most frequently cited in the authorities, in which conversation of leaseholds and other personalty has been ordered are as follows:—

Litchfield vs. Baker, 13 Beav. 446;
Chambers vs. Chambers, 15 Sim. 183;
Morgan vs. Morgan, 14 Beav. 72;
McDonald vs. Irvine, 8 Ch. Div. 101;
Dimes vs. Scott, 4 Russ. 195;
Benn vs. Dixon, 10 Sim. 636;
Mayer vs. Simonsen, 5 De G. & Sm. 723;
In re Game, 1 Ch. Div. 881;
Pickup vs. Atkinson, 4 Hare 624;
Wareham vs. Brewin, 2 Ch. Div. 312;
Mills vs. Mills, 7 Sim. 501;
Thornton vs. Ellis, 15 Beav. 193.
Blann vs. Bell, 2 De G. M. & G. 775.

Most of these have been referred to herein; all of them, together with numerous others, have been examined carefully, and counsel for trustees has found in them nothing in opposition to the proposition advanced by him in this brief. In *Dimes vs. Scott,* the language of the will was imperative; the executors were expressly directed to convert the personal estate,

nothing was left to their discretion, and it was held that having neglected to convert it, the trustees were liable and the property was to be considered as if it had been duly converted. In *Benn vs. Dixon* and *Litchfield vs. Baker* the terms of the wills were simple and concise, there being in each case (as in Howe vs. Dartmouth) a gift to one with remainder over. The same is true of *Thornton vs. Ellis,* and in none of the cases are there to be found a power of retaining investments or a discretionary power of sale, while in some at least there are express trusts for conversion. *Meyer vs. Simonsen* was also a case like Howe vs. Dartmouth and in conformity with the rule of that case it was held that the personalty should be converted; the rules therefore announced in that case have no application to a case in which the Howe vs. Dartmouth rule does not apply, and where conversion is neither implied nor expressly directed. In none of the cases could the courts find any expressions indicating that the personalty was to be enjoyed by the first taker in specie.

In conclusion counsel for trustees, after a careful examination of the English authorities, respectfully submits that, in view of the circumstances surrounding the testator at the date of his will and of his death, the condition of his estate, the relation in which he stood to the beneficiaries under his will, the use of the word "rents" in the will, the authority to carry on his

business and the discretionary power of sale contained therein, no conversion of the personalty was required or intended by the testator and that the life tenants were and are entitled to the payments of the rents made to them by the trustees.

Dated: Honolulu, T. H., May 15th, 1923.

Respectfully submitted,

W. L. STANLEY,

.....

Counsel for H. Focke and H. M. Von Holt, Trustees under Will and of the Estate of James Gay, deceased. Appellees.

Service of the foregoing brief and receipt of a copy thereof is hereby admitted this..... day of May, 1923.

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Counsel and guardian ad litem for Appellants.

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Counsel for Life-tenants—Appellees.

No. 3989

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EVA GAY et al., minors, by guardian ad litem,
Appellants,

vs.

H. FOCKE et al.,
Appellees.

REPLY BRIEF FOR APPELLANTS

Upon Appeal from the Supreme Court for the Territory of Hawaii.

HENRY HOLMES,
H. EDMONDSON,
WARREN GREGORY,
Attorneys for Appellants.

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REPLY BRIEF FOR APPELLANTS

Upon Appeal from the Supreme Court for the Territory of Hawaii.

I.

Scope of Review.

LIFE TENANTS, APPELLEES, CONTEND THAT AN APPEAL TO THIS COURT FROM THE FINAL (AND ONLY) DECREE OF THE SUPREME COURT OF HAWAII DOES NOT BRING UP FOR REVIEW ALL PRIOR DECISIONS AND DECREES OF THE COURTS BELOW THAT WERE NOT FINAL.

We disagree with this contention. On the first appeal the Supreme Court of Hawaii remanded the entire cause, not part of it, and did not enter any decree (Record 63, 66, 67). Even if it had, there can be no appeal from part of a decree (*Tax Assessor v.*

Makee Sugar Co., 18 Haw. 267). It is fundamental that an appeal from the final decree in a cause brings up for review so far as appellants are prejudiced the entire proceedings in the courts below. The point is conclusively determined against this position of appellees by the decision of this court in *Rumsey v. New York Life,* 267 Fed. 554, cited in our opening brief.

II.

THE DECISION OF THE COURT BELOW THAT THE WILL IS NOT AMBIGUOUS IS CONCLUSIVE.

Appellees contend that the use of the word "rents", in the expression, "rents, income issues and profits" in the will, creates an ambiguity; and, therefore, they seek to bring into the case evidence of facts and circumstances surrounding the testator, and the nature of his estate.

On page 9 of life tenants' brief (1) (a) they say, "and using the proceeds of the whole trust estate to maintain his wife and children". There is no evidence on this point one way or another. On page 22, life tenants' brief says:

> "Did he intend to prescribe a course for his trustees, different from what he was himself pursuing, while they should 'carry on' his business?"

The evidence does not show what course testator pursued; and if it did, testator unquestionably could tell his trustees to pursue a different course. It was

his property, he could do as he liked with it; but his trustees must do what the will tells them, not as they like, it is not their property. On the same page of life tenants' brief it is asked: "Without those rents being *used up* as they came in could he have either run the business *or* supported his family?" The evidence does not say, we can only surmise—perhaps he could not, perhaps he could, else he would not have left any other property in addition to the leaseholds. Life tenants further ask, "And without using them up did he expect his trustees to do so?" The will answers this in the affirmative by giving only the income for the support and maintenance of the children.

Any question of considering surrounding facts and circumstances or the nature of the estate has been finally determined and decided against appellees by the court below. They have not appealed and cannot, therefore, contend that the decree or decisions of the court below are wrong.

Fitchie v. Brown, 211 U. S. 321;
Castle v. Irwin, 25 Haw. 786.

They are confined to supporting and defending (not attacking) the decree and decisions. The court below said:

> "From the fact that the will provides for *rents* to be paid to the life tenants and the further fact that the testator had no real estate the life tenants argue that the word 'rents' could apply only to leaseholds and that the obligation to convert is thereby negatived. They cite *Goodenough v. Tremamondo,* 2 Beav. 512 (48

Eng. Rep. (Repr.) 1280). There the will, which was not *executed* so as to pass real estate, after bequeathing specific legacies, provides: (quoting) * * * Other cases are cited in support of this contention but this one seems to be the most nearly in point of any.

"The case at bar is distinguished from Goodenough v. Tremamondo primarily by the fact that the will in that case was not *executed* so as to pass real estate, while the will in the case at bar was not so restricted, although the testator owned no real estate at the time of his death. Under these circumstances we cannot say that the word 'rents' refers to anything more than the real estate which the testator might have acquired between the making of his will and his death and which would have passed by his will *in the form he made it* had he acquired any.

"Our conclusion as to the effect of the use of the word 'rents' is supported by the decision in *Pickup v. Atkinson,* 4 Hare 624 (67 Eng. Rep. (Repr.) 797), where, * * * the testator bequeathed the 'rents and profits, dividends and interest' of all the residue of his property to his wife for her life with gift over of the whole of the residue after her decease to other persons, and there was no freehold. The Vice-Chancellor, in discussing the question, said: 'If the use of the word 'rents' in one case, with reference to leaseholds not specifically bequeathed, is to be taken as sufficient evidence that the tenant for life of the residue was intended to enjoy the leaseholds in specie, I do not know how to stop short of the conclusion that any other word by which income may be described is to have the same effect with reference to the property in respect to which it is paid * * *'."

See also other cases cited (Record 57, 59).

The Gay will actually speaks of *real* estate: "I hereby give, *devise* and bequeath * * * all my estate real personal or mixed". The will in itself is complete. As stated on page 17 of our original brief, the word "rents" is satisfied by a reference to the word "real" used in the will—"all my estate real personal or mixed * * * to pay the rents income issues and profits arising from and out of my said estate". While appellees refer to surrounding facts and circumstances and the condition of testator's estate, they *do not* attempt to explain why the testator spoke in his will of "real" estate,—they say he had none when he made his will. He could then only have meant to refer to any real estate he might acquire before he died. There is no ambiguity in the (language of the) will, but appellees seek to create an ambiguity by a reference to the property the testator happened to have when he died. The expression "rents income issues and profits" is the most customary way of denoting *income* as distinguished from *capital* or *corpus.*

As elsewhere stated, the appellants here contend that the decision of the court below as to the application and meaning of the term "rents" is conclusive upon this court since no appeal was taken from that judgment by the present appellees, but assuming that this court may now consider this question, the decision of the court below is clearly right. If the testator intended to devise to the life tenants the

rents *eo nomine* then in effect he devised to them his entire estate, and the distinction made manifest in the will between corpus or capital, and income ceases to exist. To sustain the position now claimed by appellees on this point this court must hold that the testator intended a *specific* and not a *general* legacy or devise. In this view the expression "all my estate, real, personal or mixed", etc., is an idle one, and must be ignored. We assume that it is elementary that a testator must be deemed to intend "equality among the objects of his bounty" and that "a legacy is presumed to be general unless it clearly appears to be specific".

40 *Cyc.*, p. 1872 and cases cited.

With reference to testator's dying condition when he made his will, the Circuit Judge said of the evidence:

> "the purpose (of its introduction) being to show that the will here in question was made by him with reference only to the estate which he then already had and was disposing of, and, therefore, that in using the word 'rents' in the clause 'rents, income, issues and profits arising from and out of said trust estate', when he did not then own any real estate, he meant 'rents' from both Ookala and Mokuleia leases rather than to rents from any real estate he might possibly yet acquire before his death. This was objected to by the guardian ad litem. * * * I hold, however, that it would not affect the question of the duty of the trustees to have converted the Ookala lease as has now been directed by the Supreme Court" (Record 70, 71).

It would not affect the Mokuleia lease either, because the whole estate was given to the trustees upon trust by the most general words. On the second appeal the Supreme Court of Hawaii did not consider these surrounding facts and circumstances, but appellees did not ask for a rehearing or appeal.

Appellees invoke rules of construction and cite cases about other wills. Such citations might be indefinitely multiplied. The court below said:

> "The testator's presumable intention is that there shall be equality of enjoyment where there are no directions as to how the estate shall be enjoyed. It is the intention *presumed by law* in the *absence* of any *contrary intention expressed* by the testator, and being only a presumption of intention, it must give way to any intention expressed by the testator. When once you have arrived at the intention of the testator you must give effect to it notwithstanding the rule in Howe v. Dartmouth. Any other conclusion would be in conflict with our own decisions." Citing authorities (Record 56, 57).

There is no doubt about the plain *expressed* "purposes" in Gay's will. It is only in case of doubt or ambiguity that surrounding facts and circumstances are considered.

Nearly every will differs in some respect from another. The first thing to do is to read the will and see what intention the testator expressed. In all the cases cited by life tenants and the trustees, there is not one in their favor with expressions similar to those in Gay's will, where the will con-

tained a direction, that the trustees should carry on the testator's business, "so long as it can be done so profitably, and without loss" and empowering them in their discretion to sell when such a course would "be beneficial and inure to the benefit of or increase the trust estate created under this will". We are not concerned with other wills, but with Gay's will.

The method of dealing with the proceeds of the business which appellees say should be adopted, would, if applied, destroy the capital of every business which consisted of personal property. If a railroad, an engineering, a merchandise, or a ranching or any other business paid out all the proceeds received, without replacing rolling stock, etc., machines, etc., stock in trade, etc., or live stock, or creating a reserve, what would become of the business or its capital? It could not be carried on "profitably, and without loss" as testator said should be done. Depletion or loss of capital is the worst kind of loss imaginable. Testator not only says the business is to be carried on "profitably", but he also says "without loss". If he meant, as appellees say he meant, all the proceeds were to be paid out, how could he mean the business to suffer anything else but loss? Appellees don't explain, nor can we. They fail to observe the difference between profit of the nature of income and receipts. Receipts are not all income or profit properly so called.

Appellees argue that because the rents from the sub-leases of testator's property were comparatively small when he died and for some years thereafter, he must have meant his wife and children to receive them all. Would the same will mean one thing if the rents totalled only $200.00 a year, and another thing if they totalled $20,000.00 or $200,000.00 or $2,000,000.00 a year? Where would the line be drawn, when the rents were, let us say, $1,000.00 or $10,000.00 or $100,000.00 or $1,000,000.00 or any other sum? What the trustees should have done, if they did not sell the leases, was to put a value on them and pay the life tenants interest on that value or treat the rents as part income and part capital. Where the *will is not ambiguous* the condition of the estate or property cannot be invoked to, either,

(a) Explain the intention, or

(b) Control the construction or extent of devises therein contained (see cases cited in our first brief, pages 14, 15).

We know no law that prevents a man with a small estate creating a trust. This right is not restricted to persons owning large estates.

The amount and condition of the estate cannot be used to *create* doubts about the meaning of the will. The will comes first, and if its meaning be plain, the property must be dealt with accordingly.

The case should not be confused by injecting into it surrounding facts and circumstances such as the dying condition of the testator and the nature of his property. The case must be simplified and clarified by cutting away dead wood and "dead issues"—to borrow life tenants' expression. If the court will take Gay's will and read it without the influence of extraneous matter, there can be no doubt of its meaning. Having determined that meaning, its application to the property is simple. The citation on life tenants' brief, pages 73-74 from *In re Hollebone* (1919), 2 Ch. 93, shows one simple way of applying it.

Appellees contend that as Gay knew, when he made his will, he was going to die soon, his will should be read differently from the way he made it, and with the facts of approaching death and the condition of his estate in mind. If a man lived a day, two days, three days, a week, a month, a year, three years, after making his will knowing he had some incurable disease and must die soon, would the court give different meanings to the same words according to the time which elapsed before he died? Circumstances such as his property may change from time to time between the time the will is made and death but the will does not change. In Hawaii a will speaks from the death of the testator, and if it be complete on its face, as is Gay's will, it is the only source from which the intention of the testator may be ascertained.

The creation of the trust, and the provision that the *trustees* should "manage, conduct and carry on" the business of ranching and stockraising at Mokuleia, is conclusive proof that the testator did *not* intend to devise to the life tenants any property in specie or that the life tenants were themselves to carry on the business.

There appears then no necessity for a reference to any facts or circumstances de hors the will. The document is clear and singularly free from ambiguity and, therefore, must speak for itself. But if life tenants be right in their contention that such reference to surrounding circumstances may be had, then in one aspect at least, their theory of this appeal is demolished, for if we assume that Gay drew his will having in mind the then condition of his property, we must further assume that he knew that these leasehold interests would expire, the one in 1908 at the latest, and the other in 1934. He must have known furthermore that his children were then very young, and in the natural course of events would survive for a very considerable period, the expiration of the term of the longer lease. Under such circumstance he did not intend that the children should be paid all these rentals for as long a time as any of them should live, knowing that there would be no rentals for a considerable portion of such period. If the word "rentals" has the specific meaning claimed by appellees there must result a pronounced hiatus in the general scheme of the will.

That the testator did not intend to give to the life tenants the corpus of his estate is made manifest again by the care with which he has employed the language providing for the distribution of the income. The testator did not say that the income must be paid to the life tenants; on the contrary, he directed his trustees, so long as his wife lived, to pay the rents, etc., to her, for the support of herself and also "for the support, maintenance and education of my children". After the death of the wife, the trustees are directed to pay, not the rent, income, etc., directly to the children, but for the "support and maintenance of my children" etc.

So that there is not even an unrestricted bequest of the income only. The children may not do with this income as they see fit. They may not use it for investment purposes. It is only intended for the "support and maintenance" of the sons, and the "support, maintenance and education" of the daughters. It is not necessary now to consider whether or not the children are entitled to the entire income, although it may exceed the amount reasonably necessary for their support, maintenance and education. The point here made is that the use of the income is limited by the will and the children are not entitled to such income for all purposes. This expression "support and maintenance" is mentioned three times. The income is to be paid for that purpose as long as the children

shall live, not until the expiration of the leaseholds, so that the extent of the bequest is measured by the life or lives of the children, and not by the character of the property so devised.

If, as appellees contend, the proceeds are corpus if the lease be sold, but income if it be not sold, then the "trust estate" will be benefited by a sale at any price, even one dollar, because it is manifest that under this view the lease and all income therefrom will go to the life tenants, and the trust estate will be constantly diminishing so that by 1934 it will be reduced to nothing. The provision directing the trustees to carry on the business "profitably and without loss" and the express power of sale given to the trustees to be exercised when, in their discretion, a sale would be of "benefit and inure to the benefit of or increase the trust estate created under this will", both included in one paragraph, as almost the last thought in the testator's mind in making his will, seem to compel the conclusion that the testator was solicitous for the maintenance and increase, if possible, of the trust *estate,* and that it was furthest from his mind to have the trustees take such a course of action as must inevitably diminish and ultimately destroy that trust estate instead of increasing it.

III.

CONSIDERATIONS ARISING FROM THE CREATION OF THE TRUST ESTATE.

Throughout the record of the case below and the briefs, but little, if any, reference has been made to the fact that the testator devised and bequeathed to two trustees all of his estate for certain uses and purposes therein named.

The testator did not devise his estate to his wife and then to his children, with the remainder over to his grandchildren, nor did he use any such terms as requesting the trustees to pay over the "residue" or "what remains of said trust estate after the death of the prior taker".

The only purpose of creating this trust at all was obviously to preserve a distinction between "estate" and "income". From the standpoint of appellees these two terms mean the same thing since all the estate will necessarily be used up in paying the income. From their point of view, therefore, this will has the same effect as if it said that the testator gave all of his estate to his wife with the residue over to his children, and upon the death of the longest lived of such children, any residue remaining to the grandchildren. They must say that the expression, "rents, income, issues and profits arriving from and out of my said estate", is synonymous with the expression, "my estate".

The mere fact that this trust was created, evidences an intention on the part of the testator to *preserve* the corpus of his estate for a residuary devisee or legatee; otherwise why was a trust created at all?

That the creation of such a trust was one of the primary purposes of the testator is shown by the care taken to provide for the appointment of a successor trustee, in the event of the death, resignation or other incapacity of those originally appointed.

The testator has made a clear distinction between his "estate" and the "income arising therefrom". This distinction could not have been more clearly emphasized since in the case of each life tenant the same term is used, that is to say, he gives to his two trustees all of his estate, real, personal or mixed, but he does not authorize the trustees to convey such *estate* to his wife. To the contrary he directs them

> "to pay the rents, income, issues and profits arising from and out of my said estate to my wife for the support of herself, etc."

After the death of the wife the intention of the testator to convey, not the estate, but so much of the income resulting therefrom as might be necessary for the support of the children, is again shown by express language. It is only in that portion of the will which deals with a period of time when all

of the children of the testator shall be dead, that the *"trust estate"* shall be conveyed by the trustees. After the death of the wife, and all the children, the testator, *for the first time* directs his trustees to convey the trust *estate*. Up to this point he desired the "estate" to be owned and controlled by his trustees and not by his wife or his children.

This distinction between corpus and income is made crystal clear by the direction to the trustees to pay the share or portion *of the income* belonging to any child, to the heirs of such child so dying; that is, the wish was clearly expressed that after the death of *all* of the children, the trust estate and all additions or increases thereto should go to the grandchildren, but upon the death of *any one* of the children, his or her proportionate share of the *income only* should go to the heirs of such child so dying.

It is submitted that it is not possible to draw an instrument which would more clearly indicate the intention of a testator that a distinction be made between the principal or corpus of his estate and the income resulting from that estate. He obviously did *not* intend that the rents, income, issues and profits arising from his estate should have the same meaning as the term his "estate"; otherwise the whole scheme of the will, the creation of the trust and the directions to the trustees is made an idle

thing, and it could have been written in these few lines:

> "I devise all my property to my wife as long as she shall live, with remainder over to my children, and after the death of the longest lived of them, to my grandchildren."

Such was *not* the intention of the testator.

It has been urged repeatedly that it is impossible to believe that the testator intended to give to his children only the income from his estate and preserve for his grandchildren yet unborn, the corpus of the estate. This argument ignores the creation of the trust. It is obviously the intent of the testator that neither his wife nor his children should consume *all* of his estate, and so he appointed trustees. The children benefit by any increase of the trust estate to the extent that the income resulting therefrom increases,—in other words, the testator did not wish his children to *consume* his entire property. If he had so desired he could have stated that the children should not take any part of the corpus of his estate until they respectively reached a certain age, and such limits would not violate the rule against perpetuities so long as provision was made for a second taking in the event of the death of any one of the children. There is no more common provision than this in wills. There is, we submit, no provision of law which prevents a testator from *preserving* the corpus of his estate for the benefit of his descendants so long as the rule against per-

petuities is not violated. The testator here evidently did not wish his children to receive all his estate during their lifetime, but he wished, by creating this trust, to build up a fund which would, as time went by, increase, and thereby result in a greater income for the children, as well as benefit the grandchildren.

If the testator did not wish any of his children to inherit his property, he had a perfect right to so provide. That such a will might be considered "unnatural" is not to declare it invalid. The testator here did not go to any such extent. On the contrary, it is demonstrable that the argument here made for the maintenance and preservation of the corpus of the estate is for the actual benefit of the life tenants as well as of the remaindermen. If the value of the Mokuleia leasehold is amortized by the same method as was the Ookala leasehold, and the date of such conservation be fixed either at the time of the death of the testator, or in 1906, the value of the trust estate will be very considerable, and the children will benefit by such increase since they will be entitled to the income resulting therefrom. By reference to the record (pp. 127-128), it will be noted that the rentals from this lease from the date of the death of the testator down to and including the year 1919, exceeded in gross amount, $281,000.00, and in net amount, $248,000.00. The average rental for the last five years has exceeded $16,000.00 per annum. It is, of course, impossible to be certain

as to these rentals in the future, but if the average for these five years be continued for the remaining 15 years after 1919, of the lease, it will result in a sum in excess of $200,000.00 being added to the aforesaid $248,000.00 as corpus of the estate, after deducting the rental under the head lease and administration charges. An income at even approximately 6% on the aggregate of these sums will yield a substantial provision for the life tenants, and this will continue as long as the longest lived of them shall live, whereas if all the income be now paid to the life tenants, nothing will be left to them after 1934. Is it wiser that the children get $16,000.00 for say eleven years for their support only or 6% on this investment *for life* and for any purpose? As a practical matter we assert that there can be no question as to the ultimate benefit to all parties concerned by such a permanent investment, since it must be continually borne in mind that the children have a right to the income until the death of the longest lived of them, whilst the revenue from the leaseholds must inevitably cease in 1934. If this trust estate were incorporated, it is obvious that recognized methods of bookkeeping would require the present directors to set up a depreciation fund for the benefit of future stockholders, and this is, we think, the universal practice with corporations whose assets consist of wasting properties, such as mines, oil wells, etc.

IV.

THE SALE BY THE TRUSTEES OF THE RANCH AND STOCK-RAISING BUSINESS AT MOKULEIA IN 1906 COMPELLED THE TRUSTEES TO RE-INVEST AS OF THAT DATE ANY MONEY REALIZED FROM SUCH SALE IN PERMANENT SECURITIES.

In the interesting and learned opinion of the court below (61), the direction of the testator as to the Mokuleia lease is considered, and it was there held that the directions of the trustees to carry on the business of ranching on this leasehold interest, negatived any intention of a conversion of the property as of the death of the testator. For this reason alone it was held that the doctrine of *Howe v. Earl of Dartmouth* would not apply in this particular respect.

The anonymous conclusion is, therefore, reached that although there is no power of sale given to the trustees of the Ookala leasehold, it should be considered as having been sold as of the death of the testator, while the Mokuleia leasehold which *is* authorized to be sold by the trustees, should not be considered as so sold.

The record here shows without dispute that in 1906 the trustees elected to consider that the business of ranching and stockraising at Mokuleia could no longer be done profitably and without loss, and the trustees at this time did elect to retire absolutely from such business. For convenience we here repeat the language of the will in this case:

> "It is my wish and I hereby direct that my said Trustees or their successors or successor,

shall manage, conduct and carry on the business of ranching and stock-raising at Mokuleia on the Island of Oahu, so long as it can be done so profitably, and without loss; and I hereby empower them or their successors or successor at any time when in their discretion they think that a sale of all the property of said Mokuleia, would *by reinvestment* of the money realized from such sale of said property be beneficial and inure to the benefit of or increase the Trust Estate created under this will, to sell and convey the said property at Mokuleia free and barred of the Trust created by this will."

The record states (pp. 123-4):

"The family continued to reside at Mokuleia until Mr. Gay died, in April, 1895, when the children went to Honolulu. After Gay's death the trustees continued to carry on the testator's ranching business along the same general lines as he had done in his lifetime, until some time in the year 1906 when the livestock and movable assets used in connection with the ranching business were sold by the trustees, realizing $4,065.00 net. This sum has since been invested and held by the trustees as corpus of the estate. In the meantime, on December 9, 1898, a portion of the Mokuleia lease containing an area of about 800 acres was subleased by the trustee to B. F. Dillingham for the balance of the term of the head lease at a rental of five per cent of the sugar (or the proceeds thereof) grown thereon. This sublease was assigned to the Waialua Agricultural Company and on July 2, 1902, the trustee subleased to that Company for the remainder of the term of the head lease 65 acres more of the Mokuleia lease at a like sugar basis rental. In 1906 when the ranch stock was sold the rest of the Mokuleia lease was subleased by the trustees to others for fixed

annual rentals and for the remainder of the term of the head lease. All of the Mokuleia lease is now sublet."

The statement, "until Mr. Gay died, in April, 1895", should be, "until *Mrs.* Gay died, in April 1895."

It is submitted that in any event the value of the subleases for the remainder of the term of the head lease after 1896 must be amortized in the same way as the sum of $4,065.00 received from the sale of the live stock and movable assets, and that this sum should be held as corpus of the estate.

Since the subleases were made for the whole term of the head lease they were in effect a sale or assignment thereof.

Washburn on Real Property, 5th Ed., Vol. I, p. 541;

Cook v. Jones, 28 S. W. Rep. 960;

Hollywood v. First Parish, 78 N. E. Rep. 124;

Stover v. Chasse, 26 N. Y. Supp. 740;

Gulf, etc. Ry. Co. v. Settegest, 15 S. W. Rep. 228.

The court, therefore, has a situation in which it appears that the trustees did, in compliance with the instructions of the testator, dispose of the business of ranching and stockraising, and sell all the property connected with said leasehold interest. They were empowered, in the event of such sale, to "reinvest" the money realized therefrom.

This re-investment must be made with a view to the interest of the life tenants and also the remaindermen. We submit that there is no reason in the position that the trustees should invest the money from the sale of live stock in permanent securities, and not take the same course with the moneys realized from the sale of the leasehold interest.

If, therefore, this court should concur in the decision of the court below to the effect that the direction to

> "carry on the business of ranching and stock-raising at Mokuleia discloses an intention on the part of the testator that this leasehold interest should not be converted as of the date of his death",

nevertheless the generally accepted rule as to the duties of trustees in the investment of trust funds became applicable at once when the trustees elected to go out of the business of ranching and stock-raising. The testator empowered his trustees to sell this particular leasehold interest when a re-investment of the money realized from such sale of said property (would) be beneficial and inure to the benefit of or increase the trust estate created under this will. This *re*-investment, which must, as far as possible, preserve an equality among all of the objects of the bounty of the testator, can not be of such a character as would preserve the corpus for the benefit of the life tenants only. The moneys to be thereafter realized from the sub-leases, which were in effect assignments, have the same trust

marks upon them as would deferred payments. If the trustees had sold the cattle for a certain sum, payable in installments, it would not be asserted that these installments, as they were paid, should be turned over *in toto* to the life tenants, because this would clearly be a division of the corpus of the estate, nor would such assertion be made if the trustees, instead of making sub-leases, had in 1906 sold the leasehold interest in question, upon installment payments. In either event, these installments would be capital or corpus and not income.

Thus the question is as to the general duty of trustees in the investment of trust funds. This proceeding was instituted by the petition of the trustees praying that they be instructed by the court as to their duties in the premises. The court in passing upon this petition acts as a court of chancery and has a wide discretion within the fixed boundary lines that the intention of the testator must be carried out as far as possible and the rights of all the recipients of his bounty preserved. The fact that a conversion of the estate into permanent securities could not be made as of the time of the death of the testator, does not militate against the argument here made. If it be to the benefit of all parties concerned that the time of the conversion should be postponed, this does not rigidly foreclose the principle of *Howe v. Dartmouth.*

In Re Hollebone, 2 Ch. 93;
Gibson v. Bott, 7 Ves. 36;
Furniss v. Cruikshank, 130 N. E. R. 625.

This court has now before it the question of the validity of the judgment of the court below. The terms of the will seem to be clear in drawing a distinction between capital and income and the court below so decided. The measure of this appeal is the effect of the decision as concerns the Mokuleia leasehold interest. It is submitted that when the trustees carried out the provisions of the will and ceased to continue the business of ranching and stock-raising upon this leasehold interest, at least from that time forward it was their duty to re-invest the future payments in some form of permanent securities for the benefit of the entire estate which included the interest of the life tenants as well as of the remaindermen. It is a simple case of a decision as to the character of a re-investment which should inure to the benefit of and increase a trust estate. It needs no argument to prove that a trust estate cannot be increased when its entire corpus is being annually consumed.

Dated, San Francisco,
June 25, 1923.

Respectfully submitted,
HENRY HOLMES,
H. EDMONDSON,
WARREN GREGORY,
Attorneys for Appellants.

No. 3989

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EVA GAY et al., minors, by guardian ad litem,
Appellants,

vs.

H. FOCKE et al.,
Appellees.

BRIEF OF LIFE TENANTS APPELLEES IN ANSWER TO REPLY BRIEF OF APPELLANTS.

WILLIAM O. SMITH,
LOUIS J. WARREN,
EDWARD M. LEONARD,
Attorneys for Life Tenants, Appellees.

No. 3989

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EVA GAY et al., minors, by guardian ad litem,
Appellants,

vs.

H. FOCKE et al.,
Appellees.

BRIEF OF LIFE TENANTS APPELLEES IN ANSWER TO REPLY BRIEF OF APPELLANTS.

Now that the subleases and contract introduced in evidence in the Circuit Court have been added to the record on appeal we deem discussion proper to the point that they do not constitute an assignment of the head leases nor a conversion of the trust estate as contended for a fourth proposition in reply brief for appellants, and in making answer we deem it advisable to briefly answer the other points contended for in appellants reply.

I.

SCOPE OF THE APPEAL.

With appellants contention, that there can be no appeal from a part of a final decree and that the

final decree brings up for review the entire proceeding in the Courts below, we agree. But was not the final decree only regarding the Ookala lease? And were not all matters regarding the Mokuleia lease made final by the former decision of the Supreme Court of Hawaii? We contend that an affirmative answer is correct in each instance. Moreover, we contend that if by reason of this appeal this Court finds that manifest error has been committed, it will direct the entry of a decree which will correct that error even though it be not agreeable to the party appealing.

II.

A LATENT AMBIGUITY.

Appellants quote from the first opinion of the Supreme Court of Hawaii, and contend that this opinion is conclusive that the will is not ambiguous. They state, page 3:

> "Any question of considering surrounding facts and circumstances or the nature of the estate has been finally determined and decided against appellees by the court below."

We submit that any opinion as to "facts" or "circumstances" regarding the nature of the estate which have been given expression to by the Court below, is not binding upon this Court.

Hendry v. Perkins, 59, C. C. A. 266, 123 Fed. 268.

Moreover, when the opinion quoted from was rendered that portion of the testimony of Mr. Focke (Tr. 138-140) which shows clearly that the testator had made his will in view of impending death, had not yet been given and was not before the Court.

Appellees are here seeking to sustain the *decree* as regards the Mokuleia lease and, if that decree is sustainable on *any* ground, it makes no difference whether the lower Court assigned a *different* ground therefor (4 Corpus Juris 1132). The *opinion* of the Supreme Court of Hawaii and the reasoning on which it is based are of no legal consequence; it is the *decree* alone which is important. Hence appellees' argument based on the use of the term "rents" is just as open now as it was in the lower Court. And if the result of sustaining the decree as regards the Mokuleia lease on this ground necessitates a reversal of the decree as regards the Ookala lease, that result is entirely permissible under Hawaiian law where an appeal in equity opens up the whole case "as to any or all of the parties" (Revised Laws of Hawaii, Sec. 2509; *Estate of Kapukini,* 14 Haw. 204, 205; *Spreckels v. Gifford,* 10 Haw. 379, 383).

The cases of *Castle v. Irwin,* 25 Haw. 786, 788, and *Fitchie v. Brown,* 211 U. S. 321, 329, cited by appellants on page 3 of their reply brief, fail to consider the scope of Section 2509 of the Revised Laws of Hawaii nor does it appear that it was pointed out in either of those cases. The most that can be said

of their effect is that an appellee will not be heard to attack a decree, but they do *not* hold that the Court may not modify the decree in favor of such appellee. In this case the argument of the appellees based on the use of the word "rents" in regard to the Mokuleia leaseholds *supports* the decree as regards *that* lease. If this particular argument is sustained, it also overthrows the decision as regards the Ookala lease. This is a situation entirely different from that involved in the two cases cited, where appellees made a direct attack on the decrees involved. Here there is no direct attack on the decree, but merely an attack *necessarily involved* in an endeavor to *support* the principal part of the decree.

The foregoing is, of course, without prejudice to the claim that no decree as regards the Mokuleia lease is involved in this appeal. If the Court holds with appellees on this point, then, under the two cases cited, any attack on the decree as regards the Ookala lease would fail, but only in that event. We must in this connection point out that we fail to agree with appellants in their contention (Reply Brief, pp. 1-2) that the Mokuleia lease is involved in this appeal. It may well be said that no appeal could have been taken as regards the Mokuleia lease until the whole cause was determined, but the decree now appealed from was one in regard to the *Ookala lease only* (Record, pp. 72, 85, 86-87) and

the appeal was in no way directed (as it perhaps might have been) to the prior decree as regards the Mokuleia lease (see main brief of life tenants, pp. 4 to 8 inclusive, fully developing this point).

III.

TRUST ESTATE.

We submit that there has been no effort on the part of appellees to construe the word "estate" to mean the same thing as "rents, income, issues and profits", and we believe it unnecessary to add further argument to the point that the estate consisted of certain personal property which has been converted and two leases, and that from these leases certain rents, income, issues and profits accrued. It cannot be said that the rents, income, issues and profits from the leases are leases themselves.

IV.

THERE HAS BEEN NO CONVERSION BY THE TRUSTEES BY REASON OF SUBLEASES.

Appellants contended, page 22:

> "Since the sub-leases were made for the whole term of the head lease they were in effect a sale or assignment thereof".

This Court has now before it certified copies of the two head leases together with the several sub-

leases which were made and a certain contract regarding the Ookala leasehold. All of these documents as will be seen, were offered and received in evidence as a part of the record on the trial of the case in the Circuit Court.

It will be noted that each of the subleases is for a term less than that of the head lease and that the agreement regarding the Ookala lease is not in the form of a sublease but is simply a planting or crop contract. There can be no doubt but that where a sublease is for a less period than the term of head lease that no assignment can be construed.

16 *R. C. L.* 825, Section 320;
Sexton v. Chicago Storage Co. (Ill.) 21 N. E. 920;
Davis v. Vidal, 105 Tex. 444; 151 S. W. 290; 42 L. R. A. N. S. 1084 (with note);
I Tiffany on *Landlord and Tenant,* 907.

In conclusion, may we reiterate that this Court sitting as a Court of Equity, will view all the surrounding circumstances of trust created by James Gay's will, and in doing so will take into account those facts and circumstances as they existed at the time of making the will, to arrive at the intention of testator. We submit that it cannot by any method of reasoning be said, that James Gay when he directed the drafting of this will and signed it, intended that his wife and children, then minors, would take but six per cent of the rents coming to

him from his investment in leases, and leave the entire sum total of these rents to be accumulated for the purpose of becoming the property of expectant heirs. In other words he did not intend that his wife and seven minor children should get less than $130.00 for their support and maintenance for the entire year following his death, while over $2000.00 would be set aside in the expectation that his then babies should rear children. When he said "rents" he meant all of the rents, as they then existed, leaving full discretion with the trustees as to what portion, if any, of his personal property should in the future be converted for the benefit of grandchildren.

Dated, San Francisco,
July 27, 1923.

Respectfully submitted,
WILLIAM O. SMITH,
LOUIS J. WARREN,
EDWARD M. LEONARD,
Attorneys for Life Tenants, Appellees.

No. 3989

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EVA GAY (a minor), BEATRICE GAY (a minor), SONNY JAMES MOKULEIA GAY (a minor), MICHAEL VANATTA K. GAY (a minor), LLEWELLYN NAPELA GAY (a minor), ALBERT GAY HARRIS (a minor), WALTER WILLIAM HOLT (a minor), ALICE K. HOLT (a minor), and ETHEL FRIDA HOLT (a minor), by HARRY EDMONDSON, their guardian ad litem,

Appellants,

vs.

H. FOCKE and H. M. VON HOLT, trustees under the will of the estate of JAMES GAY, deceased, and LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY, ALICE MARY K. RICHARDSON, HELEN FANNY GAY and FRIDA GAY,

Appellees.

SUPPLEMENTAL BRIEF FOR APPELLANTS.

HENRY HOLMES,
H. EDMONDSON,
WARREN GREGORY,
Attorneys for Appellants.

No. 3989

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EVA GAY (a minor), BEATRICE GAY (a minor), SONNY JAMES MOKULEIA GAY (a minor), MICHAEL VANATTA K. GAY (a minor), LLEWELLYN NAPELA GAY (a minor), ALBERT GAY HARRIS (a minor), WALTER WILLIAM HOLT (a minor), ALICE K. HOLT (a minor), and ETHEL FRIDA HOLT (a minor), by HARRY EDMONDSON, their guardian ad litem,

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H. FOCKE and H. M. VON HOLT, trustees under the will of the estate of JAMES GAY, deceased, and LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY, ALICE MARY K. RICHARDSON, HELEN FANNY GAY and FRIDA GAY,

Appellees.

SUPPLEMENTAL BRIEF FOR APPELLANTS.

With the permission of counsel we briefly discuss the phase of the case which has arisen by reason of an amendment to the record. In the transcript of record as originally filed it was stated (pp. 123-4)

that the subleases were for "the remainder of the term of the head lease".

The amendment consists in bringing before this court copies of the head lease and of the subleases from which it appears that the head lease was for the term of fifty years from the first day of May, 1884, or in other words it will terminate on April 29, 1934. The subleases, of which the one dated July 2, 1902, may be taken as an example, are for the term of thirty-five years, seven months and five days from September 15, 1898, or in other words they will expire on April 20, 1934, so that there will remain a difference of nine days between the full term of the head lease and the term of the subleases.

While it appears from the bill of particulars presented with the amendment that these exhibits were filed in the trial court, it does not appear that they were a part of the record on appeal to the Supreme Court of the Territory, and strictly speaking we take it that this court may now consider only the record on appeal below. However, this is, from our standpoint, immaterial, since we urge that the amendment does not overcome the argument advanced in Subdivision IV of our reply brief. To the contrary the fact that this difference in the terms of the respective leases is the *only* answer made reinforces our position to the effect that when the trustees ceased to carry on the business of ranching and stockraising at Mokuleia, dis-

posed of the live stock and movable assets, and made the subleases for terms which were for all practical purposes, the full term of the head lease, that from that time forward at least and at the latest, this particular property of the testator was *converted* and the obligation of the trustees to reinvest the proceeds for the benefit of the remaindermen as well as for the life tenants, became obvious.

These subleases were not planting or crop contracts such as were considered by this court in

O'Brien v. Webb, 279 Fed. 117 (California Alien Law Decision).

To the contrary they are formal documents demising "all that certain land situate at Mokuleia, etc., bounded and described as follows" (here follows description by metes and bounds). Thus they are grants of the *land* itself and not of the right to the crops to be grown thereon.

The authorities cited by counsel on this point involved the consideration of a question arising between a landlord and his tenant as to whether or not the defendant as lessee was directly liable to an owner for his rental. No such question is here involved since this is not an action between the owner or the original lessee and the sublessees, and none of them are parties to this suit. The court is here concerned only with the question of the proper disposition of funds collected by trustees to the beneficiaries thereof of such funds, and whether or

not these contracts are strictly and technically assignments of the head lease or subleases is quite immaterial if, for all purposes *as concerns the beneficiaries,* they effect a *re-investment* of the property in question.

The rental stipulated in the subleases was

> "as an *annual* rental the gross value of one-twentieth of all sugar or other products grown or produced upon said premises in each year during said term."

The payments of the rental were to be made during the months of July and December of each year. The last payment under the subleases must, therefore, be made in December, 1933, as the semi-annual payment on the crop for the current year and this amount will be precisely the same whether the sublease expires on April 20th or April 30th, 1934. This difference, therefore of time will not change the *trust fund* by a farthing. The beneficiaries, whether they be life tenants or remaindermen, will receive precisely the same amount of money which ever date is selected.

Since, therefore, the rights of the parties here must remain the same the alleged distinction is of no importance whatever since the law must regard the substance and not the form.

> "The Courts will look through form to substance."
>
> *Safe Deposit & Trust Co. v. Miles,* 273 Fed. 822;
>
> *Eisner v. Macomber,* 252 U. S. 189 at p. 211.

It is submitted, therefore, that this change in the record in no wise controverts our position as to the duty of the trustees when they elected to go out of the ranching and stockraising business and make these subleases. From the standpoint of the will and the trust there created, the trustees, when they made the subleases, changed the character of the business and of the property. They did *in fact convert* what was previously an investment in a ranching and stockraising business to an entirely different character of investment. It was their duty to see that the income resulting from such new investment so converted be made in such method as to comply with the expressed wish of the testator to the end that the money realized "would inure to the benefit of or increase the trust *estate* created under this will".

We shall not burden the court with a re-statement of the other questions in the case, some of which are again discussed in the reply briefs for the life tenants and the trustees.

Dated, San Francisco,
August 6, 1923.

Respectfully submitted,
HENRY HOLMES,
H. EDMONDSON,
WARREN GREGORY,
Attorneys for Appellants.

No. 3989

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EVA GAY et al., minors, by guardian *ad litem*,
Appellants,

vs.

H. FOCKE et al.,
Appellees.

SUPPLEMENTAL BRIEF FOR THE TRUSTEES, APPELLEES, IN RESPONSE TO REPLY BRIEF FOR APPELLANTS.

W. L. STANLEY,
S. HASKET DERBY,
Attorneys for Appellees, Trustees.

No. 3989

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EVA GAY et al., minors, by guardian *ad litem*,
Appellants,

vs.

H. FOCKE et al.,
Appellees.

SUPPLEMENTAL BRIEF FOR THE TRUSTEES, APPELLEES, IN RESPONSE TO REPLY BRIEF FOR APPELLANTS.

At the conclusion of the oral argument in this case appellants obtained leave to file a reply brief and leave was also granted to the life tenants and the trustees to answer the same. Upon the filing of said reply brief, copies were forwarded to Honolulu and local counsel for the trustees have now been instructed that no answering brief is deemed necessary except for the purpose of clearing up the facts surrounding a *new* contention made by appellants both in their argument and reply brief—a contention not theretofore made in the case.

On page 22 of the reply brief it is stated that, since the subleases of the Mokuleia property were made for *the whole term* of the head lease, they were in effect a

sale or assignment thereof. To substantiate this point an extract from Washburn on Real Property (5th edition) is cited and four cases, which appear to hold that, as a pure matter of abstract law as between landlord and tenant, a sublease for the *whole balance* of a term operates as an assignment. The whole subject is fully and carefully treated in the 6th edition of Washburn (Vol. I) in Sections 692, 693 and 694. It is there pointed out that not only must the sublease be for the full balance of the term to give it this effect (the retaining of the "smallest reversionary interest"—"a day, an hour, or a minute will be sufficient", Id., Secs. 692 and 693), but also that the reservation of a right of re-entry and other covenants defeat any claim of an assignment (Id., Sec. 694 and cases there cited. See also Null v. Garlington & Co., 242 S. W. 507, 511; Murdock v. Fishel, 121 N. Y. Supp. 624). When it is considered that, in the case at bar, the subleases do not appear in the record on appeal, that they were made, not to one person, but to several different persons, and that the rentals in most of them were not fixed at a definite amount of money, but on contingent amounts of sugar, etc., produced on the premises, it is readily apparent that the principle in question has no bearing on this case and that there was clearly no assignment of the head lease. Moreover, the said principle of real property law as between landlord and tenant in regard to assignments in no sense means that in an entirely different case such as the one at bar there was any *conversion* of the head lease so as to

justify treating the rents from the subleases as corpus instead of income.

It is readily apparent, we think, in view of the above, that, without the subleases before it, this court is in no position to determine that there was an assignment of the head lease and as appellants did not make these subleases a part of the record on appeal (though they were in evidence in the court below) they are in no position to raise this point as to an assignment, which they have sought to inject into the case at the eleventh hour.

There is, however, a much more conclusive answer to the new contention now made and that is that *as a matter of fact* the subleases were *not* made for the *full term* of the head lease, but were so drawn as to end a short period *before* said head lease expired (each sublease also containing a reversionary clause for surrender back to the sublessor prior to the termination of the head lease). This is made perfectly clear by appellants' fourth assignment of error reading as follows:

> "4. The Court erred in not holding under the terms of said will that the trustees thereof, in subleasing all the land comprised in the said Mokuleia lease for the unexpired period *except the last few days of the said term thereof,* in effect sold the said Mokuleia lease at a price payable by installments, such price being the net annual sums received for same; and that the amounts so received and to be received from such subleases or their value as of testator's death form part of the *corpus* of testator's estate" (Record, p. 90).

As before stated, all of the subleases were in evidence in the court below and they showed on their face that they were *not* for the *full term* of the head lease, but held back a *reversionary interest.* No contention was made or could have been made in the court below that the subleases operated as an assignment. The record on appeal was made up under Equity Rule No. 75 of the United State Supreme Court (Record, 106-107) and, in place of the actual testimony and exhibits, a record in narrative form was prepared (Record, 120-147). The subleases were not included in this record for the reason that they were deemed immaterial and their exact terms *were* immaterial under the theory on which the case was tried below and on which it was argued in the Supreme Court of Hawaii. Such terms have only *become* material because of the *new* contention made by San Francisco counsel for the appellants, who was not familiar with the record in the lower court. When this new contention was made on the oral argument the writer objected to its consideration, which objection was not passed on by the court, but, if there was ever a case where such an objection should be sustained, this is such a case. If the point had been made in the original briefs, steps could have been promptly taken to supplement the record, but, as it is, the point was in fact made in the absence of those familiar with the record (except the guardian *ad litem*) and only on the receipt of the reply brief did the appellees learn fully of it.

We think it apparent from the foregoing that this court will not sustain the contention that there was an

assignment of the head lease in the absence of the subleases from the record, but will, if it deems their terms material, call for the production of the subleases. We are informed that counsel for the life tenants contemplate putting the terms of these subleases before the court either by stipulation (if such a stipulation can be secured) or by a motion to amplify the record. The trustees feel sure, however, that, in view of appellants' assignment of error number 4 above quoted and in view of all of the considerations herein advanced, there will be no determination by this court that the subleases constitute an assignment when the fact is patent that they did *not* constitute an assignment and when said subleases were not included in the record on appeal. In other words, the trustees (though believing that the contentions of the life tenants are correct) desire only a determination of the questions involved on the *true* facts of the case and not on any new theory now advanced for the first time on a record which did not contemplate the putting forward of the same.

Apart from the foregoing, the trustees do not feel that appellants' reply brief requires any further answer.

Dated, San Francisco,
July 23, 1923.

Respectfully submitted,
W. L. Stanley,
S. Hasket Derby,
Attorneys for Appellees,
Trustees.

No. 3991

United States Circuit Court of Appeals

For the Ninth Circuit.

JAMES H. WOODS,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 3991

United States
Circuit Court of Appeals
For the Ninth Circuit.

JAMES H. WOODS,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Counsel.

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310 Federal Building, Seattle, Washington.

[1*]

United States District Court, Western District of Washington, Northern Division.

November, 1921, Term.

No. 6431.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES H. WOODS,

Defendant.

Information.

BE IT REMEMBERED, that Thomas P. Revelle, Attorney of the United States of America for the Western District of Washington, who for the said United States in this behalf prosecutes in his

*Page-number appearing at foot of page of original certified Transcript of Record.

own person, comes here into the District Court of the said United States for the district aforesaid on this 5th day of December, in this same term, and for the said United States gives the Court here to understand and be informed that as appears from the affidavit of Arvid Franzen made under oath, herein filed:

COUNT I.

That on the 2d day of December, 1921, at the City of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this Court, one James H. Woods, then and there being, did then and there knowingly, wilfully and unlawfully have and possess certain intoxicating liquor, to wit, twenty-four (24) ounces of a certain liquor called distilled spirits, and one (1) quart of a certain liquor called whiskey, then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for beverage purposes, a more particular description of the amount and kind whereof being to the said United States Attorney unknown, intended then and there by the said James H. Woods for use in violating the Act of Congress passed October 28, 1919, known as the [2] National Prohibition Act, by selling, bartering, exchanging, giving away and furnishing the said intoxicating liquor, which said possession of the said intoxicating liquor by the said James H. Woods as aforesaid, was then and there unlawful and prohibited by the Act of Congress known as the National Prohibition Act; contrary to the form of the statute in such case made

and provided and against the peace and dignity of the United States of America.

COUNT II.

And the said United States Attorney for said Western District of Washington further informs the Court that on the 2d day of December, 1921, at the City of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, one James H. Woods, then and there being, did then and there knowingly, wilfully and unlawfully sell to Arvid Franzen for beverage purposes certain intoxicating liquor, to wit, eight (8) ounces of a certain liquor called distilled spirits, then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for beverage purposes, a more particular description of the amount and kind whereof being to the said United States Attorney unknown, and which said sale by the said James H. Woods, as aforesaid, was then and there unlawful and prohibited by the Act of Congress passed October 28, 1919, known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT III.

And the said United States Attorney for said Western District of Washington further informs the Court that on the [3] 2d day of December, 1921, at the City of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, one James H.

Woods, then and there being, did then and there knowingly, wilfully and unlawfully sell to Arvid Franzen for beverage purposes certain intoxicating liquor, to wit, sixteen (16) ounces of a certain liquor called distilled spirits, then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for beverage purposes, a more particular description of the amount and kind whereof being to the said United States Attorney unknown, and which said sale by the said James H. Woods, as aforesaid, was then and there unlawful and prohibited by the Act of Congress passed October 28, 1919, known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT IV.

And the said United States Attorney for said Western District of Washington further informs the Court that on the 2d day of December, 1921, at the City of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, one James H. Woods, then and there being, did then and there knowingly, wilfully and unlawfully conduct and maintain a common nuisance, to wit, a certain drug-store located at 115 First Avenue, in the said City of Seattle, in the said division and district, where intoxicating liquor containing more than one-half of one per centum of alcohol by volume and fit for use for beverage purposes was kept in violation of the

Act of Congress passed October 28, 1919, known as the National [4] Prohibition Act, by using the said drug-store in which to keep such intoxicating liquor, and which maintaining of said nuisance by the said James H. Woods, as aforesaid, was then and there unlawful and prohibited by the Act of Congress known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

THOMAS P. REVELLE,
United States Attorney.
GEORGE E. MATHIEU,
Assistant United States Attorney.

Warrant to issue.
Bail fixed $750.00.

NETERER,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Dec. 5, 1921. F. M. Harshberger, Clerk. By F. L. Crosby Jr., Deputy. [5]

Affidavit of Arvid Franzen.

United States of America,
Western District of Washington,
Northern Division,—ss.

Arvid Franzen, being first duly sworn, on oath, deposes and says: That on December 2d, 1921, at the City of Seattle, in the Northern Division of the

Western District of Washington, he purchased from one James H. Woods, who was then *and* the proprietor and owner of the Northern Drug Company, located at 115 First Avenue South in said City of Seattle, eight (8) ounces of intoxicating liquor known as distilled spirits; that he paid the said James H. Woods the sum of One Dollar ($1.00) for the same.

That thereafter and subsequent thereto but on the same day the affiant purchased from the said James H. Woods two (2) eight-ounce bottles of intoxicating liquor known as distilled spirits, for which he paid the sum of Two Dollars and Fifty Cents ($2.50) each, and that at such time and place the said James H. Woods had and possessed one (1) quart of intoxicating liquor known as whiskey.

That all of said intoxicating liquor then and there contained more than one-half of one per centum of alcohol by volume and was then and there fit for use for beverage purposes, a more particular description of the amount and kind whereof being to affiant unknown.

That the acts hereinabove mentioned and complained of were then and there unlawful and prohibited by the Act of Congress passed October 28, 1919, known as the National Prohibition Act.

ARVID FRANZEN.

Subscribed and sworn to before me this 3d day of December, A. D. 1921.

[Seal U. S. Dist. Court.]

FRANK L. CROSBY, Jr.,

Deputy Clerk, U. S. District Court, Western District of Washington.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Dec. 5, 1921. F. M. Harshberger, Clerk. By F. L. Crosby, Jr. [6]

United States District Court, Western District of Washington, Northern Division.

No. 6431.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES H. WOODS,

Defendant.

Arraignment and Plea.

Now, on this 19th day of December, 1921, the above defendant comes into court with F. C. Reagan his attorney for arraignment and says that his true name is James H. Woods. Whereupon the reading of the information is waived and he here and now enters his plea of not guilty. Trial in this cause is set for February 14, 1922.

Journal No. 9, page 444. [7]

United States District Court, Western District of Washington, Northern Division.

No. 6431.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES H. WOODS,

Defendant.

Trial.

Now, on this 9th day of May, 1922, the above defendant comes into open court for trial accompanied by his attorney John F. Dore and with C. E. Allen, present in behalf of the Government. Whereupon all parties being ready for trial a jury is duly empaneled and sworn as follows: Truman L. Richards, Evan Espelund, George Schroder, Willis F. Pierce, F. M. Evans, Clarence A. Parks, John A. Paine, Ernest Pearse, Earle E. Sigley, Chas. E. Ross, Henry C. Rohrback, and Abraham A. Tremper. Opening statement is made to the jury for respective parties. Government witnesses are sworn and examined as follows: S. E. Bunker, R. Bowen, F. Semple, A. G. Anderson, A. Franzen, A. B. Stites, A. Jacobson, O. R. Boltin. Government Exhibits 1, 2, 3, 4, 5, 6 and 7 are introduced as evidence. Government rests. Defendant moves for dismissal of the case. Said motion is denied. Defendant's witness, James Woods is sworn and examined. Defendant's exhibits lettered "A," "B" and "C"

are introduced as evidence. Defendant rests. The jury is now instructed by the Court and retires for deliberation. It is also instructed by the Court to return a verdict of not guilty as to count IV of the information. And after further instruction by the court the jury retires and is to return a sealed verdict at 10 A. M. May 10, 1922.

Journal #10, page 150. [8]

United States District Court, Western District of Washington, Northern Division.

No. 6431.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES H. WOODS,

Defendant.

Trial—Verdict Returned.

Now, on this 10th day of May, 1922, the above defendant and all parties being present, a verdict is returned of not guilty on Counts I, II and IV and guilty on Count III. Verdict reads as follows: "We, the jury in the above-entitled cause, find the defendant James H. Woods, not guilty, as charged in Count I of the information herein; and further find the defendant James H. Woods, not guilty as charged in Count II of the information herein; and further find the defendant James H. Woods, is guilty as charged in Count III of the information

herein; and further find the defendant James H. Woods, not guilty as charged in Count IV of the information herein. J. A. Paine, foreman."

Journal No. 10, page 153. [9]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 6431.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES H. WOODS,

Defendant.

Verdict.

We, the jury in the above-entitled cause, find the defendant James H. Woods not guilty, as charged in Count I of the information herein; and further find the defendant James H. Woods not guilty, as charged in Count II of the information herein; and further find the defendant James H. Woods is guilty, as charged in Count III of the information herein; and further find the defendant James H. Woods not guilty, as charged in Count IV of the information herein.

J. A. PAINE,
Foreman.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern

Division. May 10, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [10]

United States District Court, Western District of Washington, Northern Division.

No. 6431.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES H. WOODS,

Defendant.

Motion in Arrest of Judgment.

Comes now the defendant and moves that the judgment in this cause be arrested for the following reasons:

I.

Because the verdict of not guilty on Count I amounts to an acquittal on Count III.

JOHN F. DORE,
Attorney for Defendant.

Acceptance of service of within motion acknowledged this 12 day of May, 1922.

THOS. P. REVELLE,
Attorney for Plaintiff.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. May 12, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [11]

United States District Court, Western District of Washington, Northern Division.

No. 6431.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES H. WOODS,

Defendant.

Motion for New Trial.

Comes now the defendant herein and moves for a new trial in this cause, for the following reasons:

I.

That the verdict is contrary to law and the evidence.

II.

That there was not sufficient evidence to support the verdict.

III.

Errors of law occurring at the trial and excepted to at the time.

IV.

That the verdict of guilty returned on Count III and the verdict of not guilty returned on Count I renders the verdict contradictory.

V.

That there was no evidence to support the verdict.

JOHN F. DORE,
Attorney for Defendant. [12]

Acceptance of service of within motion acknowledged this 12 day of May, 1922.

THOS. P. REVELLE,
Attorney for Plaintiff.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. May 12, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [13]

In the District Court of the United States for the Western District of Washington, Northern Division.

CRIMINAL—No. 6431.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JAMES H. WOODS,
Defendant.

Decision.

Filed June 2, 1922.

THOS. P. REVELLE, U. S. Attorney, and CHAS. E. ALLEN, Asst. U. S. Attorney, Attorneys for the United States.

JOHN F. DORE, Attorney for the Defendant.

NETERER, D. J.—The defendant is charged in four counts with violation of the National Prohibition Act. Count 1, charges that on the 2d day of

December, 1921, he unlawfully possessed 24 ounces of distilled spirits and one quart of whiskey, etc.; count 2, that on the same day he unlawfully sold 8 ounces of the distilled spirits, etc.; count 3, that on the same day he unlawfully sold 16 ounces of said distilled spirits, etc., both sales being made to one A. Franzen; count 4, charges the defendant with maintaining a nuisance.

Upon the trial there was testimony tending to show that the defendant is a druggist, and that he had in his possession 24 ounces of alcohol, and that at sometime during the day he sold Franzen 8 ounces of alcohol, and at another time 16 ounces of alcohol. A verdict of not guilty was directed as to count 4. The jury returned a verdict of not guilty as to counts 1 and 2, and guilty as to Count 3. The defendant has moved in arrest of judgment on the ground that a verdict of not guilty as to count 1 is an acquittal on count 3; and a motion for a new trial upon various grounds, [14] among which, that the verdict of not guilty returned on count 1 is inconsistent with the verdict of guilty on count 3. This is the only ground in the motion meriting consideration.

Count 1, charges the defendant with the unlawful possession of 24 ounces of alcohol. The defendant admitted having the alcohol, and being a druggist he could lawfully possess it, and the jury was so instructed. Counts 2 and 3 charge the unlawful selling. The defendant could lawfully sell alcohol. He contends the sale was lawful. The verdict of

not guilty as to the possession merely found that the defendant was not in unlawful possession, and guilty as to count 3 the jury found that he unlawfully sold. The verdict is not inconsistent, and is in harmony with the instructions given by the court, and is not out of harmony with Rosenthal vs. U. S. 276 Fed. 714, upon which the defendant relies. The verdict merely finds that the defendant unlawfully sold what he lawfully possessed. The motions are denied.

NETERER,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 2, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [15]

United States District Court, Western District of Washington, Northern Division.

No. 6431.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JAMES H. WOODS,
Defendant.

Sentence.

Comes now on this 19th day of June, 1922, the said defendant James H. Woods into open Court

for sentence and being informed by the court of the charges herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him and he nothing says save as he before hath said. Wherefore, by reason of the law and the premises it is considered ordered and adjudged by the Court that the defendant is guilty of violating the National Prohibition Act and that he be punished by being imprisoned in the King County Jail, or in such other place as may be hereafter provided for the imprisonment of offenders against the laws of the United States, for the term of sixty days on count III of the information. And the said defendant James H. Woods is now hereby ordered into the custody of the United States Marshal to carry this sentence into execution.

Judgment and Decree, Vol. III, page 292. [16]

United States District Court, Western District of Washington, Northern Division.

No. 6431.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES H. WOODS,

Defendant.

Petition for Writ of Error.

In the Above-entitled Court, and to the Honorable JEREMIAH NETERER, Judge Thereof:

Comes now the above-named defendant, James H. Woods, and by his attorney, John F. Dore, respectfully shows that on the 10th day of May, 1922, a jury impanelled in the above-entitled court and cause returned a verdict finding the above-named defendant guilty of the indictment theretofore filed in the above-entitled court and cause; and thereafter, within the time limited by law, under the rules and order of this Court, the defendant moved for a new trial, which said motion was by the court overruled and an exception thereto allowed; and thereafter, on the 19th day of June, 1922, this defendant was by order and judgment and sentence of the above-entitled court in said cause sentenced as follows: 60 days in King County jail;

And, your petitioner herein, feeling himself aggrieved by said verdict and the judgment and sentence of the Court herein as aforesaid, and by the orders and rulings of said Court, and proceedings in said cause, now herewith petitions this Court for an order [17] allowing him to prosecute a writ of error from said judgment and sentence to the Circuit Court of Appeals of the United States for the Ninth Circuit, under the laws of the United States, and in accordance with the procedure of said court made and provided, to the end that the said proceedings as herein recited, and as more fully set

forth in the assignments of error presented herein, may be reviewed and the manifest error appearing upon the face of the record of said proceedings and upon the trial of said cause, may be by said Circuit Court of Appeals corrected, and that for said purpose a writ of error and citation thereon should issue as by law and ruling of the court provided; and wherefore, premises considered, your petitioner prats that a writ of error issue to the end that said proceedings of the District Court of the United States for the Western District of Washington may be reviewed and corrected, the said errors in said record being herewith assigned and presented herewith, and that pending the final determination of said writ of error by said Appellate Court, an order may be entered herein that all further proceedings be suspended and stayed, and that pending such final determination, said defendant be admitted to bail.

JOHN F. DORE,

Attorney for Petitioner, Plaintiff in Error.

Acceptance of service of within petition acknowledged this 20th day of June, 1922.

THOS. P. REVELLE,

Attorney for Plaintiff.

By E. D. DUTTON.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 19, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [18]

United States District Court, Western District of Washington, Northern Division.

No. 6431.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES H. WOODS,

Defendant.

Assignments of Error.

Comes now the above-named defendant, James H. Woods, and in connection with his petition for writ of error in this cause, submitted and filed herewith, assigns the following errors which the defendant avers and says occurred in the proceedings and at the trial in the above-entitled cause, and in the above-entitled court, and upon which he relies to reverse, set aside and correct the judgment and sentence entered herein, and says that there is manifest error appearing upon the face of the record and in the proceedings, in this:

I.

The Court erred in overruling the motion for new trial herein.

II.

The Court erred in overruling the motion in arrest of judgment herein.

III.

The Court erred in failing to set aside the verdict

rendered in this cause, for the reason that the said is inconsistent in that the defendant was by the verdict found guilty of selling liquor which the jury found by their verdict that he did not possess with intent to sell. [19]

IV.

The Court erred in taking charge of the trial in the presence of the jury, calling witnesses himself and interrogating them.

V.

The Court erred in overruling the motion for directed verdict at the close of the Government's case and at the close of the defendant's case, for the reason that it appeared at that time the prosecution's testimony was largely perjured and that the prosecution was the result of a "frame-up" and it was error to permit the verdict to stand on such testimony.

VI.

The Court erred in taking charge of the trial and eliciting from the witness Stites the statement that a bonus was paid to the police department for obtaining evidence against places wherein the proprietor had been on trial before and acquitted, and eliciting the statement from the witness that the defendant Woods had been tried before and acquitted.

VII.

The Court erred in calling the witness Anderson to the stand and inquiring what a "bonus" was and eliciting from said witnesses that a "bonus" was an amount paid to secure the conviction of a

person who was believed to have had police protection, the inference being that the defendant Woods was such a person.

VIII.

The Court erred in giving that part of his instructions wherein it was stated that some one had perjured himself in the case and that he had called the matter of Franzen's testimony to the attention of the District Attorney, and the discussion of this matter in the instructions was improper and highly prejudicial to the defendant. [20]

IX.

The Court erred during the trial in the investigation held in the presence of the jury as to the probability of Franzen's having himself committed perjury.

X.

Thereafter, and within the time limited by law and the order and rules of this court, said defendant moved for a new trial, which said motion was overruled by the Court, and an exception allowed, which ruling of the Court the defendant now assigns as error.

XI.

Thereafter, and within the time limited by law, the defendant moved the Court that judgment and sentence upon the verdict rendered in the above-entitled cause be arrested and stayed, which motion was overruled by the Court and an exception allowed the defendant, and the defendant now assigns as error the overruling of said motion.

XII.

The Court erred in overruling the motion in arrest of judgment entered herein.

XIII.

The Court thereafter entered judgment and sentence against said defendant, upon the verdict of guilty rendered upon said indictment, to which ruling and judgment and sentence the defendant excepted, and now the defendant assigns as error that the Court so entered judgment and sentence upon the verdict.

And as to each and every of said assignments of error, as aforesaid, the defendant says that at the time of making of the order or ruling of the Court complained of, the defendant duly excepted and was allowed an exception wherever the same appears in the record to the ruling and order of the Court.

JOHN F. DORE,
Attorney for Defendant. [21]

Acceptance of service of within assignments of error acknowledged this 20th day of June, 1922.

THOS. P. REVELLE,
Attorney for Plaintiff.
By E. D. DUTTON.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 19, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [22]

United States District Court, Western District of Washington, Northern Division.

No. 6431.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES H. WOODS,

Defendant.

Order Allowing Writ of Error and Fixing Amount of Bond.

A writ of error is granted on this 19th day of June, 1922, and it is further ORDERED that, pending the review herein, said defendant, James H. Woods be admitted to bail, and that the amount of the supersedeas bond to be filed by said defendant be the sum of Ten Hundred Dollars.

And it is further ORDERED that, upon the said defendant's filing his bond in the aforesaid sum, to be approved by the clerk of this court, he shall be released from custody pending the determination of the writ of error herein assigned.

Done in open court, this 19th day of June, 1922.

JEREMIAH NETERER,

Judge.

Acceptance of service of within order acknowledged this 20th day of June, 1922.

THOS. P. REVELLE,

Attorney for Plaintiff.

By E. D. DUTTON.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 19, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [23]

United States District Court, Western District of Washington, Northern Division.

No. 6431.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES H. WOODS,

Defendant.

Appeal and Bail Bond.

Know All Men by These Presents: That we, James H. Woods, as principal, and L. H. Fox and Anna Fox, of Seattle, King County, Washington, and James V. Pelletier and ————, of Seattle, King County, Washington, as sureties, are held and firmly bound unto the United States ofAmerica, plaintiff in the above-entitled action, in the penal sum of One Thousand ($1000.00) Dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, and our and each of our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

The condition of this obligation is such that, whereas the said defendant was, on the 19th day of June, 1922, sentenced in the above-entitled cause

to be confined for the period of sixty days in the King County Jail; and, whereas, the said defendant has sued out a writ of error from the sentence and judgment in said cause to the Circuit Court of Appeals of the United States for the Ninth Circuit; and, whereas, the above-entitled court has fixed the defendant's bond, to stay execution of the judgment in said cause, in the sum of One Thousand ($1000.00) Dollars;

Now, therefore, if the said defendant, James H. Woods, shall diligently prosecute his said writ of error to effect, and [24] shall obey and abide by and render himself amenable to all orders which said Appellate Court shall make, or order to be made in the premises, and shall render himself amenable to and obey all process issued, or ordered to be issued, by said Appellate Court herein, and shall perform any judgment made or entered herein by said Appellate Court, including the payment of any judgment on appeal, and shall not leave the jurisdiction of this court without leave being first had, and shall obey and abide by and render himself amenable to any and all orders made or entered by the District Court of the United States for the Western District of Washington, Northern Division, and will rendered himself amenable to and obey any and all orders issued herein by said District Court, and shall, pursuant to any order issued by said District Court, surrender himself, and will obey and perform any judgment entered herein by the said Circuit Court of Appeals or the said District Court, then this obli-

gation to be void; otherwise to remain in full force and effect.

Sealed with our seals and dated, this 19th day of June, 1922.

JAMES H. WOODS. (Seal)
L. H. FOX. (Seal)
ANNA C. FOX. (Seal)
JAMES V. PELLETIER. (Seal)

6/24/22.

O. K.—CHAS. E. ALLEN,
. Assistant United States Attorney.

Approved:
NETERER,
Judge. [25]

United States of America,
State of Washington,
County of King,—ss.

L. H. Fox and Anna C. Fox, his wife, and James V. Pelletier, being first duly sworn, upon oath, each for himself and not one for the other, says:

I am a resident of the State of Washington, over the age of twenty-one years, and not an attorney or counselor at law, sheriff, clerk of the superior court, or other officer of such court, or of any other court; that I am worth, over and above all debts and liabilities, and exclusive of property exempt from execution, in real estate situate in King County, Washington, as follows: Said L. H. Fox—Lot 8, Blk. 15, Mt. Baker Park Add. $8000—

Mort. $1000. Said Pelletier—Lots 3 & 4, Blk. 48 Burns & Atkinson Add. to Green Lake. $1200.

L. H. FOX.
ANNA C. FOX.
JAMES V. PELLETIER.

Subscribed and sworn to before me, this 19th day of June, 1922.

[Notarial Seal] F. C. REAGAN,
Notary Public in and for the State of Washington, Residing at Seattle.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 24, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [26]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6431.

JAMES H. WOODS,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

Order Extending Time to and Including July 14, 1922, to File Bill of Exceptions.

For good cause shown, it is ORDERED that the time for serving and filing the bill of exceptions in this cause be and the same is hereby extended until July 14, 1922.

Done in open court, this 29th day of June, 1922.

JEREMIAH NETERER,
Judge.

O. K.—THOS. P. REVELLE,
Attorney for Defendant in Error.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 29, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [27]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6431.

JAMES H. WOODS,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Order Extending Time to and Including September 19, 1922, to File Record and Docket Cause.

For good cause now shown, it is ORDERED that the time for filing the record in the above-entitled cause in the office of the clerk of the above-entitled court be and the same is hereby extended to and including the 19th day of September, 1922.

Done in open court, this 17th day of July, 1922.

EDWARD E. CUSHMAN,
Judge.

O. K.—THOS. P. REVELLE,
Attorney for Defendant in Error.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 17, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [28]

In the United States Court of Appeals for the Ninth Circuit.

No. 6431.

JAMES H. WOODS,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Order Extending Time to and Including November 1, 1922, to File Record and Docket Cause.

For good cause shown, it is ORDERED that the time for filing the record in the above-entitled cause in the office of the clerk of the above-entitled court be and the same is hereby extended to and including the 1st day of Nov., 1922.

Done in open court, this 18th day of September, 1922.

JEREMIAH NETERER,

Judge.

O. K.—CHAS. E. ALLEN,

Attorney for Defendant in Error.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern

Division. Sep. 18, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [29]

United States District Court, Western District of Washington, Northern Division.

No. 6431.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES H. WOODS,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED that on the 9th day of May, 1922, at the hour of ten o'clock A. M., the above-entitled cause came on regularly for trial in the above-entitled court before the Honorable Jeremiah Neterer, Judge thereof; the plaintiff appearing by Charles E. Allen, Assistant United States Attorney for said district, and the defendant being present in person and by his counsel, John F. Dore.

A jury having been regularly and duly impanelled and sworn to try the cause, and the Assistant United States Attorney having made a statement to the jury, the following evidence was thereupon offered:

Testimony of S. C. Bunker, for the Government.

S. C. BUNKER, a witness produced on behalf of the Government, being duly sworn, testified as follows:

Direct Examination.

I am and was a federal prohibition agent on December 2, 1921, and was present at the time of the arrest of the defendant, James H. Woods, in his drug-store in the Northern Hotel Building in Seattle, on December 2d. About ten o'clock at night we went down [30] to the Northern Drug Store, on First Avenue South. The man that we sent in there to buy alcohol gave the signal that he had purchased it, the police officer and myself went in the store, followed by Anderson, another police officer. The man's name that bought the liquor was Franzen, I believe; he was working for the Prosecuting Attorney's office. Franzen gave me two eight-ounce bottles of alcohol. He got them from the store; I got them off Mr. Franzen. A fellow named Stites was in the hotel, looking through the door into the drug-store. The defendant was behind the counter. I saw the two bottles now handed to me on the night of December 2d, in the drug-store of Mr. Woods. They are the bottles that Mr. Franzen handed me. I swallowed some of the liquid; it didn't hurt me, it burned. (Bottles marked for identification.) I saw Mr. Woods break a bottle of liquor; it was mopped off the floor. Woods was behind the

(Testimony of S. C. Bunker.)

counter when we came in, and he stepped behind the partition and picked up a bottle and threw it on the floor. That is a part of the bottle I picked up at that time.

(The piece of bottle here referred to admitted as Government's Exhibit ——.)

Franzen had that glass in his hand. (Glass marked for identification.) The defendant made no statement that I can remember of. At the time of the raid two one-dollar bills, two silver dollars and two half-dollars were handed to Franzen. The money was found on the showcase under the little card stand about half way from the prescription booth to the front of the building. I picked up the two bills and the two dollars and the two half-dollars. The money was checked in my presence by Bowen and Anderson. (Money marked for identification.)

Cross-examination.

I did not take the money out of Franzen's hands. I did not ask Franzen to come in and testify falsely that I found the money on the counter. I deny that I have since this transaction [31] asked Franzen to come in here and deny that I took the money out of Franzen's hand. I saw no transaction between Woods and Franzen. I didn't see Woods sell anybody anything. I didn't see Woods give anybody any money. Bowen didn't carry the bottle of whiskey in with him.

Testimony of R. Bowen, for the Government.

R. BOWEN, a witness appearing in behalf of the Government, having been duly sworn, testified as follows:

Direct Examination.

I was present in the Northern Drug Company, in the Northern Hotel, at the time of the arrest of James H. Woods on December 2, 1921. It was ten o'clock at night. Mr. Bunker and I went into the store, I in the lead, upon receiving the signal. I went right straight to the back of the drug-store and started to go underneath the counter, and as I was just coming up I saw a bottle in the air. I went in the back and Mr. Woods was in there, and I gathered up the liquor that was lying on the floor and put in another bottle and put it in my pocket, and also saved the glass. That is the piece of bottle I picked up. Franzen came in then from the outside, and he said, "There is the money now, on the counter." And Mr. Woods said, "You put it there," or words to that effect, and I believe Bunker got the money. I am not sure of that. The money, I believe, was two one-dollar bills, two silver dollars and two half-dollars. It was passed to me and I put it in my coat pocket. I marked the money and took the numbers off. I have the number of the paper dollars, and the half-dollars are the same. That is the money I took from defendant's place of business that night. I made the record about nine forty-five or ten o'clock that

(Testimony of R. Bowen.)

night, before the agent entered the store. Bunker handed me those two bottles that night in the defendant's store. Woods and some other man and four [32] police officers and one Federal officer were there. The agent had a serving glass in his hand when I walked in. He laid it down on the counter when I got to him. Bunker took charge of him and I went back to the prescription counter. I found the broken neck of a bottle on the floor. (Broken neck of bottle offered for identification.)

Cross-examination.

I did not see anybody break the bottle; I saw it in the air and then I heard the crash. I did not see the money at all until after it was handed to me. Woods said, "If there is any money on the counter, you put it there," referring to the agent.

Testimony of F. Semple, for the Government.

F. SEMPLE, a witness appearing on behalf of the Government, having been duly sworn, testified as follows:

Direct Examination.

I am a police officer and was such on December 2, 1921. I was in the drug-store of James H. Woods at the time of the arrest. There was some money given to the agent. I can't tell what it was. I examined the agent roughly on the outside to see if he had any liquor. Officer Bowen felt the outside of his clothing; he had no liquor on his person. I know there was some paper money given to the

(Testimony of F. Semple.)

agent, that is all I know. Bunker took two bottles off the agent. I made the agent sit down on a box in the corner, and he pointed over to a glass similar to that one that was on the counter, which he said he had drunk out of. I think the agent's name was Franzen. Woods was behind the counter. The bottles shown me now are similar to the bottles that Franzen gave Bunker. He handed one to Bunker and Bunker took one off him in my presence. Franzen said, "There is the money on the showcase; it was lying on the glass showcase. I was about ten feet away. I didn't see the bottle broken. [33]

Cross-examination.

The money was lying in plain view on top of the glass case. As Franzen was taken in the front door, he pointed and said, "There it is. Mr. Woods put it there now." Franzen said that Woods had put it on top of the glass showcase. I believe Anderson picked it up, either Anderson or Bowen. I didn't see any sale made.

Testimony of A. G. Anderson, for the Government.

A. G. ANDERSON, a witness appearing on behalf of the Government, having been duly sworn, testified as follows:

Direct Examination.

I am and was a police officer of the City of Seattle on December 2, 1921. I was present in the drug-store of the Northern Drug Company when the defendant James H. Woods was arrested on

(Testimony of A. G. Anderson.)

the same day. In the party besides myself were Federal Prohibition Officer Bunker, Mr. Bowen, and Bolter and Semple. We sent Franzen in to attempt to buy some alcohol. Bowen and Bunker went in first and I came last. Franzen was searched before he went into the drug-store. No bottles or anything was found on him. Bunker carried two bottles to the station and gave them to me. I saw them in the drug-store that night and cut the corks off so I would recognize them. I first saw them when Bunker got them from Franzen. I didn't see any bottle of whiskey broken. I saw some whiskey on the floor with a broken bottle on the floor. I saw a serving glass sitting on the counter. Franzen had been given a couple of marked bills and some silver before he went in, and notes were made by Bowen in my presence. I took a taste of the liquor down there, it was fit for beverage purposes. I didn't hear the defendant make any statement.

Cross-examination.

I didn't see any money lying on the counter; I was behind [34] the counter looking for it. I didn't see anybody break a bottle. There was possibly half a minute between my arrival in the drug-store and the other members of the party. Bunker searched Franzen. I felt him over on the outside. I couldn't say whether he had an overcoat on or not.

(Testimony of A. Franzen.)

Redirect Examination.

The money was slid around a three-cornered display sign, possibly fifteen feet from the broken bottle, and twelve feet from the cash register.

Testimony of A. Franzen, for the Government.

A. FRANZEN, a witness appearing on behalf of the Government, having been duly sworn, testified as follows:

Direct Examination.

On December 2, 1921, I was referred to as a stool-pigeon, employed by the Prosecuting Attorney. On December 2, 1921, I went to James H. Woods' drug-store, at the Northern Hotel Building, known as the Northern Drug Company. I was there first about seven o'clock in the evening. I walked in and asked Mr. Woods if he had any alcohol. When I finished asking him the question, a policeman in uniform walked out from behind the counter, and I stepped outside. Later I walked back in and asked Woods if he had any alcohol for a spirit compass, and he said he had. I bought a small bottle of alcohol, about eight ounces. I believe I paid a dollar for it. There was a man in a brown coat, I presumed a customer, standing there. I did not tell the defendant I had some grape juice and wanted something to put a kick in it. After I left the defendant's drug-store I walked on Washington Street just south of First Avenue, and then on up about twenty minutes after to the dry squad room. I returned to this drug-store about ten

(Testimony of A. Franzen.)

o'clock that evening. I walked in and asked [35] Mr. Woods if I could get some more of the same kind of alcohol, and he said yes. Woods gave me two bottles of alcohol, and the officers rushed in and grabbed me and took two bottles of alcohol from my hip pocket. The bottles are similar to the bottles now shown me. The bottles now shown me are not the bottles that I bought from Mr. Woods. The bottles were about that size, but they are not the same. I did not see a glass of that size. I did see a small glass. I asked Woods to give me something to stop the pain of Spastic Colytis that I have suffered from for some time. It was a frosted glass he gave me. As soon as Bunker took the bottles from my pocket Semple put the handcuff on my left hand and set me on a box and the officers searched the till and Mr. Woods. The officers said, "We will have to search him," and they took some paper money from Woods, I don't remember the amount, and then they got mad when they couldn't find any money on Woods and couldn't find any money in the till, and Anderson, the policeman took me outside roughly and took the handcuff off and asked me where the money was and I said I didn't know. Then he walked into the drug-store again and I followed him in and turned my right hand up, like that, and gave the money to Bunker, rolled up in that position. I handed the money to Bunker and they told me to beat it and to keep going. I didn't say, "There is the money right there behind the showcase." I had

(Testimony of A. Franzen.)

the money in my hand all the time. I said, "Here is the money," and put it in Bunker's hand. I saw no bottle break. I did hear something break. There was a noise in the prescription room of broken glass, but what it was I couldn't say, but it was occasioned by one of the officers running underneath and trying to go through a little trap door. He caught his shoulders and shoved the matchwood partition, and whatever fell down I don't know, but I heard the crash. I didn't see the officers mop anything up off the floor. I was sitting in the corner and they were in the prescription room. I have not been a friend of Mr. Woods. I knew of Mr. Woods, I know so many [36] Alaskans that know Mr. Woods, and have heard quite a lot from the police officers about him. The police sent me down there to try to trap Woods and trick him and frame him. They told me to go down there and knock him over; that he was no good. The money was given to me up in the dry squad room, I believe Bunker gave me the money. I made a buy but not with this money. The money never was out of my hand. I drank nothing out of the bottle I got from him. I did not give Woods any money; I went in and asked for alcohol, and got it. The police rushed in too quick. I had the money in my hand and the money never left my hand.

Cross-examination.

I went down there and asked Woods for some alcohol for a spirit compass early in the evening.

(Testimony of A. Franzen.)

I believe Woods put something in the alcohol. Woods held one bottle in his hand and another bottle in his other hand. What he done I could not say. One of the bottles was the bottle he gave to me. He took one bottle and poured something in it. I told him I wanted it for a spirit compass, and wanted it straight on account of the weather being cold and freezing compasses in Alaska. The money that is in court I gave to Bunker out of my hand. It never left my hand until I handed it to Bunker. After we got back to the dry squad room I said, "Woods didn't get the money," and Bunker said, "I know that, but you have to say he did so we can stick him. We won't be able to stick him unless you do." The bottles I got from Woods that day I have them with me now. (The bottles marked for identification Defendant's Exhibits "A," "B" and "C.") I never saw any but three bottles that day in the drug-store. These are the three bottles that I bought there that day. They are in the same condition as when I bought them, except the liquor has been emptied out. I told Mr. Allen in February that I had emptied the liquor out, and that the bottles they had as evidence were not the ones I got. Mr. Allen sent for me on the 13th of February, and I told [37] him then that I would not stand for any framing up of Woods and unless I could testify truthfully I would be a better witness for the defense than I would for the prosecution, that they had tried to make me testify the way they wanted it. I told

(Testimony of A. Franzen.)

them I had three empty bottles at home, and the bottles at home were the ones I bought from Woods and the ones the dry squad had were not the ones I bought from Woods. When I bought them I made a jocular remark about sailors drinking the spirits out of compasses, and Woods said, "If they drink that it will be the last they will drink." He said that when he sold it to me. Early that evening, I was waiting for a man named Stites—I was told to work under Stites—Anderson said to me, "Do you know Jimmie Woods?" I said, "No." The name didn't strike me at the time. He said, "Do you know the Northern Drug Store?" I said, "Yes." He said, "I want you to go down there and make a buy from that son-of-a-B. He got Keefe and I want to get him before he gets me." Keefe was one of the dry squad. Nobody searched me before I entered the drug-store. I was never searched while I was in the employ of the authorities, this night or any other time. The second time I was in the drug-store I never gave any money to Woods. The bottle broken on the floor was broken by Bowen or Bolton, I am not sure. I was in the drug-store alone when I bought the first bottle for the spirit compass. I brought it back to the dry squad room but did not turn it in. I have had it in my possession ever since. I was travelling a good bit between here and British Columbia, and when I returned home here the last time and when I had read of some little children being poisoned here with Epsom salts, I took these

(Testimony of A. Franzen.)

bottles and whatever packages of salts we had and destroyed all of it on account of having those little children at home. The youngest is not quite six. I have six children at home. These three bottles are the only ones I got from Woods' drug-store that day. I poured the liquor out the same time I poured out the Epsom salts. I have suffered for some [38] time with Spastic Colytis, and I asked Woods if he had something I could take for stomach convulsions, and he mixed up something, I didn't know what it was, but it had the effect of settling the stomach. In the District Attorney's office yesterday, Mr. Allen asked who was the leader, who had started this trial, and Anderson spoke up and said he guessed he was, and when he had got a little further along in his testimony and came to me being searched, I asked Mr. Allen not to pay any attention to Anderson, that he was committing perjury, that I had not been searched. We had a few words over it and I refused to say anything further in there and told Allen to let me see the affidavit that I had signed but had never read. I made notes of that on the back. After they couldn't get anything out of me to compare with the testimony of the police officers, I said I would like to be excused. Allen said, "Can't you fellows get together in an amiable way and bring this thing out?" He said he had a good case against Woods if we would all come in and tell the same tale. It is my experience that they frame testimony in these cases right along. I have a

(Testimony of A. Franzen.)
book here that I bought when I went to work for the dry squad, with certain places I was told to knock over. I was told they were no good and I marked them so. I was offered a bonus for giving testimony to convict Woods. I was paid twenty dollars for it and Stites grabbed five of it. I got twenty-five dollars bonus, and Stites got five of it. Lt. Haig of the dry squad gave me ten dollars as a bonus, and probably two or three weeks after the raid Stites came and pulled out two five-dollar bills and said that patrolman Keefe had given him ten dollars, and handed me five. When I came back from British Columbia, probably a month after that, Keefe said, "How much do I owe you, ten?" And I said, "No, five." I got twenty dollars bonus in addition to my salary and they gave Stites ten dollars. I was only on the job a few days. I quit because I wouldn't stand to work at that class of work—to frame people. I [39] worked fourteen days. I never drank out of a glass like that down at Woods' place. I told the prosecuting attorney that the bottles I purchased from Woods were at home and that I had poured out the contents. I told Mr. Allen that it was a frame-up and told him the bottles I purchased from Woods were at home.

Redirect Examination.

I got twenty dollars bonus to testify against Woods.

Mr. ALLEN.—Q. Now, in your conversation with me, isn't it true that my remark was something

(Testimony of A. Franzen.)

about you fellows letting your personal differences go aside and testify here in the ordinary manner?

A. That was a part of the statement.

Q. Wasn't that the extent?

A. And get together on the evidence.

Q. Wasn't it the understanding you were to drop your personal differences?

A. Your statement on both occasions to get together and bring this thing out—get the evidence straightened out. (St., pp. 48, 49.) I bought eight ounces of alcohol for a spirit compass the first time I went to Woods' store that day.

Q. This is an eight ounce bottle?

A. Yes, sir.

Q. Did you ever see a compass in your life that held anywhere near that much?

A. Yes. You take a compass and turn it over on its side and take the cap screw out and fill it up until there is no bubble left, and put the screw back in again.

Q. How does it come when the officers searched you in the drug-store there and sat you down on the box they didn't take this off your person?

Mr. DORE.—I object to that as incompetent, irrelevant and immaterial.

The COURT.—That is a matter of argument. [40]

Q. You told me you poured the liquor in the gutter in front of your house?

A. I said the back of the house.

Q. Why did you pour it out?

(Testimony of A. Franzen.)

A. On account of the children being poisoned. I have the little ones around there that do all the housework, on account of my wife being an invalid and about to become a mother. The little children clean up the shelves and do all the housework, and I got rid of all the poisons we had.

Mr. ALLEN.—Now, if your Honor please, I would like to offer in evidence the affidavit this man signed on December 3d.

Mr. DORE.—I object to it as incompetent, irrelevant and immaterial.

The COURT.—You may ask about that on redirect.

Mr. DORE.—He has already testified to that, if your Honor please.

Q. Did you, in my office, sign an affidavit in this case on December 3d?

A. I signed a paper. I didn't know what it was.

Q. Yet, when you were in my office the other day, you told me it was the truth?

A. I don't recall of that taking place. I told you I had signed a paper I had never read in the Clerk of the Court's office.

Q. You read it over yourself, or it was read to you, and you said it was true?

A. You said, "You have to stand by this."

Q. I ask you if you now denied this affidavit.

A. I don't deny the affidavit I signed; what it says I couldn't say.

Q. It states the truth? A. I couldn't say.

Mr. DORE.—He never read it. Don't be silly.

(Testimony of A. Franzen.)

Mr. ALLEN.—May it please your Honor, I object to the personal remarks of counsel. [41]

Q. When did you sign it?

A. I signed the paper on the morning of the 3d, about 12 noon.

Q. Now, refreshing your memory, Mr. Franzen, didn't you sign—isn't this what the affidavit contained: "Arvid Franzen being first duly sworn, on oath deposes and says that on December 2, 1921, at the City of Seattle, in the Northern Division, Western District of Washington, he purchased from one James H. Woods, who was then and there the proprietor and owner of the Northern Drug Company, located at 115 First Avenue South in the City of Seattle, eight ounces of intoxicating liquor known as distilled spirits; that he paid the said James H. Woods one dollar for the same—"

A. I testified to that?

Q. That is right? A. I testified to that.

Q. You swore to that; is that true?

A. I just testified to it.

Q. That is true?

A. I presume it is. I testified that.

Q. "That thereafter and subsequent thereto and on the same day the affiant purchased from the said James H. Woods two eight-ounce bottles of intoxicating liquor known as distilled spirits, for which he paid the sum of $2.50."

Mr. DORE.—I object to that, if your Honor please.

Mr. ALLEN.—It is refreshing his memory.

(Testimony of A. Franzen.)

The COURT.—He may answer.

Q. Isn't that right?

A. I didn't prepare that affidavit.

The COURT.—Just answer the question.

A. Well, it is a hard question to answer. I didn't—

Q. Didn't you swear to that affidavit before the Clerk of this Court? A. Yes, sir. [42]

Q. It speaks the truth, doesn't it? A. No.

Mr. DORE.—I object to this as argumentative. I have an objection to that question.

A. That affidavit was prepared by Bunker before I came down town in the morning of the 3d, and he rushed me with it, and when I signed it, he took it away from me.

Q. Were you present when it was prepared?

A. No, sir.

Q. How do you know it was prepared by Mr. Bunker?

A. He was standing in the room there, and took it from the stenographer.

Q. You were not present at all there.

A. Not until it was handed to Bunker, and I asked the young lady to put my correct name on top, and when she made the correction with the typewriter, I started to read it, and upon doing so, Bunker snatched it away from her and started right out to the Clerk of the Court. I had signed this. When I got outside, he began to kind of abuse me and said, "If you don't appear at this

(Testimony of A. Franzen.)

trial, we will know you got the money. We want to keep this paper. We want to get that son-of-a-B."

Q. There is a lot of ill feeling between you and these officers, isn't there?

Mr. DORE.—That wouldn't make any difference.

Mr. ALLEN.—It goes to his motive.

The COURT.—That has already been covered.

Q. Now, refreshing your memory a little further: "That at said time and place, the said James H. Woods—"

A. I tell you I don't know about that.

Q. You knew this was an affidavit, didn't you?

A. No, sir.

Q. In my office, I called your attention to it and read it to you, [43] and asked you if it was true?

A. You didn't read it to me, Mr. Allen. You refused to let me read it.

Q. The first time you came into my office—

A. You tried to smooth me over, and told me to testify.

Q. I asked you to forget your personal differences; that they had no place in this case?

A. No, sir. You put it in the drawer. When I reached for it you put it in a drawer, and turned over some other papers so I couldn't see anything. That was on the 13th day of February.

Q. Did I call your attention to the reason for it?

Q. This affidavit was read to you?

A. No, sir.

(Testimony of A. Franzen.)

Q. That is your signature?

A. It is. I don't deny that.

Q. And I read it to you, didn't I?

A. No, you did not. You have been antagonistic all along—

Testimony of A. B. Stites, for the Government.

A. B. STITES, a witness appearing on behalf of the Government, having been duly sworn, testified as follows:

Direct Examination.

I am and was on December 2, 1921, an investigator for the Prosecuting Attorney's office. I was present at the store of the defendant Woods at the time he was arrested. I saw Woods pass two bottles to Franzen and I saw Franzen pass over what I thought to be money for the bottles. I saw Woods smash a dark bottle on the floor. I saw Franzen take a drink from a glass. I saw these bottles taken off Franzen's person. I can't say there was any money found on the showcase. On the counter in the dry squad room two one-dollar bills, [44] two silver dollars and two half-dollars were handed to Franzen. I never saw the money any more until in the dry squad room after the arrest. I know of no feeling existing between the officers and Franzen.

Cross-examination.

I could not identify the bills. I gave Franzen the bonus for this. I gave him twenty dollars.

(Testimony of A. B. Stites.)

Franzen was working under me. I got twenty dollars from Capt. Haig; he gave me the bonus and I gave it to Franzen. I saw Woods smash a dark bottle on the floor. I have been an investigator for a year and a half; that is the only occupation I have. Franzen quit after the arrest of Woods. I phoned him twice and tried to get him to come down to work, but he said he didn't care for the job any more.

Redirect Examination.

Q. Now, Mr. Stites, with reference to the bonus. What was the arrangement down there as to this bonus?

Mr. DORE.—I object to that as incompetent, irrelevant and immaterial. He testified a bonus was paid.

The COURT.—Sustained as to the arrangement, but I would like to know what this bonus was given for.

A. Why, in this particular case, there were several—In this case, because Officer Keefe got beat, and—

The COURT.—What was the bonus given for?

A. I have to tell of one case of that—

Mr. DORE.—Some other case he wants to tell about.

A. Whenever they have beat them before, they have to offer a bonus to get that bootlegger.

The COURT.—I want to know what the bonus

(Testimony of A. B. Stites.)

was for, for the purpose of giving testimony to establish a fact which is not true?

A. No, sir, it was not.

Q. (By the COURT.) What was the object of the bonus? [45]

A. If he made a buy and got the information on this man, he got the bonus.

Q. (By the COURT.) If he didn't get it, what then? A. He was paid his regular salary.

Mr. DORE.—That is pretty bright.

WITNESS.—He was under pay anyway.

Q. (By Mr. DORE.) He was under what?

A. Five dollars a day.

Q. (By the COURT.) Then, if a man is convicted, then he gets more?

A. On this one buy, yes. On certain places there is a bonus on it. Ranges from five to twenty dollars.

Mr. ALLEN.—I would like to ask a leading question.

The COURT.—Proceed.

Q. (By Mr. ALLEN.) Mr. Stites, Mr. Franzen has drawn the bonus, hasn't he?

A. Sure, after we brought him down to the station.

Q. Is that all there was to it?

Mr. DORE.—This is cross-examination of his own witness.

Mr. ALLEN.—Counsel went into this question.

The COURT.—I have permitted you to go into

(Testimony of ——— Jacobson.)

it, and when you are through I asked him to see what this bonus was for. (St., pp. 61, 62.)

The COURT.—I want to make this observation: I think, in view of the testimony of this man Franzen upon the witness-stand to-day, that there is a matter here that ought to be examined into by the County grand jury, and a matter here that should, perhaps, get the attention of the Federal grand jury when it is convened. I wish that your office would see that this matter is called to the attention of Major Douglas, the county attorney, and I wish the jurors—the notes are being taken here—the testimony is taken in shorthand and this can be extended and transcribed, and the matter ought to have the [46] attention of the Federal grand jury, and I will so direct.

Mr. ALLEN.—Very well, it shall be done.

Mr. DORE.—I move, in the light of what has been disclosed, that the jury be instructed to return a verdict of not guilty on this case. A case should not be submitted to a jury in this court on this character of testimony. (St., p. 63.)

The COURT.—Has the Government rested?

Mr. ALLEN.—No, your Honor.

Testimony of ——— Jacobson, for the Government.

——— JACOBSON, a witness appearing on behalf of the Government, having been duly sworn, testified as follows:

Direct Examination.

I am city chemist. I have had seventeen years'

(Testimony of ———— Jacobson.)

experience in examining liquor. I examined the alcoholic contents of this bottle. It contains seventy-nine per cent of alcohol. It is fit for beverage purposes. (Whereupon it was admitted as Government's Exhibit ——.) The alcoholic contents of the bottle labelled "Washings" contained thirty-nine per cent. It could have been used for beverage purposes.

Testimony of O. R. Bolton, for the Government.

O. R. BOLTON, a witness appearing on behalf of the Government, having been duly sworn, testified as follows:

Direct Examination.

I am and was a police officer on December 2, 1921. I was at the place of business of the defendant James H. Woods at ten o'clock that evening with the other officers. I went back of the prescription counter and saw the officers mopping up a bottle of whiskey. Woods walked up towards the front of the store. [47] Franzen was in the store at that time. I saw two bottles taken from him; the bottles were similar to those bottles.

Q. I will ask you to examine these, and see if those are the bottles, as far as you know?

A. Yes, sir. They looked like, or very similar to those bottles. They are the same, because we have got the—

Q. Did you see this bottle that night?

A. I did.

Q. What is that?

(Testimony of O. R. Bolton.)

A. It is a bottle of whiskey—that is the bottle that was broken.

Q. Did you see this bottle that night?

A. That is the stuff that was mopped up.

Q. Did you see it mopped up? A. I did.

Q. Did you see it put in this bottle?

A. I did, yes, sir.

Q. Did you see some money on the showcase, or at any time down there when you came in?

A. I did.

Q. Where was it?

A. It was up towards the front of the store, right where the defendant was standing—had been standing—just about the time he left I believe,—left that spot—this—I can't think of his name—the agent—started to go out, and he turned around and came back and said "Right there is the money." He knew we were looking for it.

Q. Who said that? A. Franzen, the agent.

Q. What is his name?

A. Franzen, or Francis.

Q. Did you see the money, yourself, lying on the showcase? A. I did. [48]

Government rests.

The COURT.—Mr. Bolton, did you get a bonus to come in and testify? A. Absolutely not.

The COURT.—In this case? A. No, sir.

The COURT.—That is all.

Mr. ALLEN.—I think Mr. Morrow from the Prosecuting Attorney's office is here. He knows about this bonus arrangement.

(Testimony of A. G. Anderson.)

Mr. DORE.—I move, in the face of the evidence of these witnesses—it seems to me it would be an imposition on the jury to submit a case to the jury on this evidence.

The COURT.—I would like to have Mr. Anderson called in. (St., pp. 69, 70.)

Testimony of A. G. Anderson, for the Government (Recalled).

A. G. ANDERSON, recalled by the Court, testified as follows:

(Questions by the COURT.)

Q. Something was said about a bonus that has been paid to some persons. Did you get a bonus?

A. No, sir.

Q. —to testifiy in this case—anything with relation to a bonus? A. No, sir.

Q. (By Mr. DORE.) You know the bonus is paid, don't you?

A. Lots of times money is paid these fellows extra for getting places that is noted for being protected by the police.

Q. Haig pays them extra for getting places noted for being protected by the police?

A. Yes, sir. (St., p. 70.)

Q. (By Mr. ALLEN.) Mr. Anderson, does that have relation to your testimony, or your work as investigator?

A. We don't have anything to do with those bonuses.

(Testimony of A. B. Stites.)

Q. (By Mr. DORE.) This bonus matter you have mentioned— [49]

The COURT.—This witness didn't testify anything with relation to it. I want to know. I wish to have Mr. Stites come back.

Testimony of A. B. Stites, for the Government (Recalled).

A. B. STITES, recalled for further examination by direction of the Court, testified as follows: (Questions by the COURT.)

Q. I want to ask you whether this bonus that you testified about a while ago, whether that obtains to the police officers? A. No, sir.

Q. To whom does it apply?

A. Why, the agent that made the buy there.

Q. Just to him and to him alone?

A. To him alone.

Testimony of James H. Woods, in His Own Behalf.

JAMES H. WOODS, the defendant, having been duly sworn, testified as follows:

Direct Examination.

I have lived in Seattle thirty-two years, and was formerly deputy collector of United States Internal Revenue. I am sole proprietor of the Northern Drug Company. The bottles marked A, B and C, with poison labels on them I sold to the man Franzen. That formula number one is bichloride of mercury one part and alcohol two thousand parts; one of the formulas prescribed by the Government.

(Testimony of James H. Woods.)

They have poison labels on them required by the Government. Franzen never gave me five dollars. The first I ever saw of the bottle of whiskey was when it was picked up in the back room on the floor. It never belonged to me. When Policeman Bowen was down in Judge Dalton's courtroom, when he was being tried for extorting money from [50] Japs, he said he was sorry for having brought the bottle in. Bolton was being tried along with Bowen, and they told me they were sorry they brought the bottle into my place.

Cross-examination.

I sold Franzen two bottles at ten o'clock. I got five dollars from him for the two bottles. They searched my till for the money, and my person. They mopped something off the floor in my back room. I was out at the cash register at the time. Franzen said he wanted to buy alcohol for a compass. I have not talked to Franzen since they arrested me. I have not known him at all. I have never been convicted of a felony.

Redirect Examination.

You can't stand in the Northern Hotel and see the cash register in the Northern Drug Store. Franzen gave me five dollars for two bottles, and I put it in the cash register. It was never taken out of the cash register by anyone.

Defendant rests.

And, now, in furtherance of justice, and that right may be done, the said defendant, James

H. Woods, tenders and presents to the Court the foregoing as his bill of exceptions in the above-entitled cause, and prays that the same may be settled and allowed and signed and sealed by the Court and made a part of the record in this case.

JOHN F. DORE,
Attorney for Defendant. [51]

[Indorsed]: Lodged in the United States District Court, Western District of Washington, Northern Division, as Proposed, Jul. 10, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

Filed in the United States District Court, Western District of Washington, Northern Division, as Settled, Oct. 5, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [52]

United States District Court, Western District of Washington, Northern Division.

No. 6431.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JAMES H. WOODS,
Defendant.

Order Settling Bill of Exceptions.

The defendant, James H. Woods, having tendered and presented the foregoing as his bill of exceptions in this cause to the action of the Court, and in furtherance of justice and that right may

be done him, and having prayed that the same may be settled and allowed, authenticated, signed and sealed by the Court and made a part of the record herein; and the Court having considered said bill of exceptions and all objections and proposed amendments made thereto by the Government, and being now fully advised, does now in furtherance of justice and that right may be done the defendant, SIGN, SEAL, SETTLE and ALLOW said bill of exceptions as the bill of exceptions in this cause, and does ORDER that the same be made a part of the record herein.

The Court further certifies that each and all of the exceptions taken by the defendant, as shown in said bill of exceptions, were at the time the same were taken allowed by the Court.

The Court further certifies that said bill of exceptions contains all the material matters and evidence material to each and every assignment of error made by the defendant and tendered and filed in court in this cause with said bill of exceptions.

The Court further certifies that said bill of exceptions was filed and presented to the Court within the time provided by law [53] as extended by the orders of the Court heretofore made herein.

Done and ordered in open court, counsel for the Government and defendant being now present, this 5th day of October, 1922.

JEREMIAH NETERER,
Judge.

O. K.—CHAS. E. ALLEN,
Ass't U. S. Atty.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Oct. 5, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [54]

United States District Court, Western District of Washington, Northern Division.

No. 6431.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES H. WOODS,

Defendant.

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please make a transcript of record on appeal to the Circuit Court of Appeals for the Ninth Circuit, in the above-entitled cause, and include therein the following:

Information and affidavit.
Plea.
Record of trial and impanelling jury.
Verdict.
Motion in arrest of judgment.
Motion for new trial.
Memorandum decision on motion for new trial and in arrest of judgment.
Judgment and sentence.
Petition for writ of error.

Assignments of error.
Order allowing writ of error and fixing amount of bond.
Appeal and bail bond.
All orders extending time for filing bill of exceptions.
All orders extending time for filing record.
Bill of exceptions.
Order settling bill of exceptions.
Writ of error.
Citation.
Defendant's praecipe.

JOHN F. DORE,
Attorney for Defendant.

We waive the provisions of the Act approved February 13, 1911, and direct that you forward typewritten transcript to the Circuit Court of Appeals for printing as provided under Rule 105 of this court.

JOHN F. DORE,
Attorney for Plaintiff in Error.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 6, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [55]

In the United States District Court for the Western District of Washington, Northern Division.

No. 6431.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES H. WOODS,

Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court, for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 55, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the clerk of said District Court, and that the same constitute the record on return to said writ of error herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the plaintiff in error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [56]

Clerk's fee, (Sec. 828, R. S. U. S.) for making record, certificate or return, 133 fo. at 15¢ $19.95

Certificate of Clerk to transcript of record, 4 fo. at 15¢ ..... .60

Seal to said certificate ..... .20

I hereby certify that the above cost for preparing and certifying record amounting to $20.75 has been paid to me by attorneys for plaintiff in error.

I further certify that I hereto attach and herewith transmit the original writ of error and original citation issued in this cause.

IN WITNESS WHEREOF, I have hereto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 17th day of October, 1922.

[Seal] F. M. HARSHBERGER,

Clerk of the United States District Court Western District of Washington. [57]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6431.

JAMES H. WOODS,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Writ of Error.

United States of America,—ss.

The President of the United States of America, to the Honorable Judges of the District Court of the United States for the Western District of Washington, Northern Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court before the Honorable Jeremiah Neterer, one of you, between James H. Woods, the plaintiff in error, and the United States of America, the defendant in error, a manifest error happened to the prejudice and great damage of the said plaintiff in error, as by his complaint and petition herein appears, and we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings with all things concerning the same, to the United

States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, State of California, together with this writ, so that you have the same at the said city of San Francisco within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held, that the record [58] and proceedings aforesaid being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done in the premises.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 20th day of June, A. D. 1922, and of the Independence of the United States one hundred and forty-sixth.

[Seal] F. M. HARSHBERGER,
Clerk of the District Court of the United States for the Western District of Washington, Northern Division.

Service of the within and foregoing writ of error and receipt of a copy thereof is hereby admitted this 20th day of June, 1922.

THOS. P. REVELLE,
By E. D. DUTTON,
United States District Attorney for the Western District of Washington, Northern Division.
[59]

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 20, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6431.

JAMES H. WOODS,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Citation on Writ of Error.

United States of America,—ss.

The President of the United States of America, to the United States of America, and to Thomas P. Revelle, United States Attorney for the Western District of Washington, Northern Division, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein the said James H. Woods is plaintiff in error, and the United States of America is defendant in error, to show cause, if any there be, why judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable JEREMIAH NETERER, Judge of the District Court of the United States for the Western District of Washington, Northern Division, this 19th day of June, 1922.

JEREMIAH NETERER,
United States District Judge.

[Seal] F. M. HARSHBERGER,
Clerk of the District Court of the United States for the Western District of Washington, Northern Division. [60]

Service of the within citation and receipt of a copy thereof is hereby admitted, this 20th day of June, 1922.

THOS. P. REVELLE,
United States Attorney for the Western District of Washington.

By E. D. DUTTON. [61]

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 19, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

[Endorsed]: No. 3991. United States Circuit Court of Appeals for the Ninth Circuit. James H. Woods, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States

District Court of the Western District of Washington, Northern Division.

Received October 20, 1922.

F. D. MONCKTON,
Clerk.

Filed March 12, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES H. WOODS,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

No. 3991

UPON WRIT OF ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF FOR THE PLAINTIFF IN ERROR.

JOHN F. DORE,
Seattle, Washington,
Attorney for Plaintiff in Error.

J. L. MACDONALD CO., PRINTERS AND PUBLISHERS, SEATTLE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES H. WOODS, *Plaintiff in Error,* *vs.* UNITED STATES OF AMERICA, *Defendant in Error.*	No. 3991

UPON WRIT OF ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF FOR THE PLAINTIFF IN ERROR.

JOHN F. DORE,

Seattle, Washington,

Attorney for Plaintiff in Error.

STATEMENT OF THE CASE.

The defendant, James H. Woods, was tried on an information containing four counts. In the first count it was charged that he did "then and there knowingly, wilfully and unlawfully have and possess certain intoxicating liquor, to-wit, twenty-four ounces of a certain liquor called distilled spirits, and one quart of a certain liquor called whiskey, then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for beverage purposes * * * intended then and there by the said James H. Woods for use in violating the * * * National Prohibition Act by selling, bartering, exchanging, giving away and furnishing said intoxicating liquor, which said possession of the said intoxicating liquor by the said James H. Woods as aforesaid was then and there unlawful and prohibited by the Act of Congress known as the National Prohibition Act * * * . In the second count he is charged with the sale, on the 2nd day of December, 1921, of eight ounces of a certain liquor called distilled spirits to Arvid Franzen. In the third count he is charged with selling, at Seattle, on the 2nd day of December, 1921, sixteen ounces of a certain liquor called distilled spirits

to Arvid Franzen. In the fourth count he is charged with maintaining a nuisance at a certain drug store at 115 First Avenue, Seattle, Washington.

After a trial by jury the jury found the defendant not guilty as to Count I, not guilty as to Count II, guilty as to Count III, and not guilty as to Count IV. In other words, the jury found by their verdict that the defendant did sell the sixteen ounces of distilled spirits on December 2, 1921, to Arvid Franzen, but found that he did not possess the liquor that he sold, which was described in Count I of the indictment and was included in the twenty-four ounces of distilled spirits mentioned in Count I.

ASSIGNMENTS OF ERROR.

I.

The court erred in failing to set aside the verdict in this cause, for the reason that the same is inconsistent in that the defendant was by the verdict found guilty of selling liquor which the jury found by their verdict that he did not possess with intent to sell.

II.

The court erred in taking charge of the trial in the presence of the jury, calling witnesses himself and interrogating them.

III.

The court erred in overruling the motion for a directed verdict at the close of the Government's case, for the reason that it appeared at that time that the prosecution's testimony was largely perjured and that the prosecution was the result of a "frame-up" and it was error to permit the verdict to stand on such testimony.

IV.

The court erred in taking charge of the trial and eliciting from the witness Stites the statement that a bonus was paid to the police department for obtaining evidence against places wherein the proprietor had been on trial before and acquitted, and eliciting the statement from the witness that the defendant Woods had been tried before and acquitted.

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IV.

The court erred in taking charge of the trial and eliciting from the witness Stites the statement that a bonus was paid to the police department for obtaining evidence against places wherein the proprietor had been on trial before and acquitted, and eliciting the statement from the witness that the defendant Woods had been tried before and acquitted.

V.

The court erred in calling the witness Anderson to the stand and inquiring what a "bonus" was and eliciting from said witness that a "bonus" was an amount paid to secure the conviction of a person who was believed to have had police protection, the inference being that the defendant Woods was such a person.

VI.

The court erred in giving that part of his instructions wherein it was stated that some one had perjured himself in the case and that he had called the matter of Franzen's testimony to the attention of the District Attorney, and the discussion of this matter in the presence of the jury was improper and highly prejudicial to the defendant.

VII.

The court erred during the trial in the investigation held in the presence of the jury as to the probability of Franzen's having himself committed perjury.

VIII.

The court erred in overruling the motion for a new trial herein.

IX.

The court erred in overruling the motion in arrest of judgment herein.

ARGUMENT.

Bunker, a witness for the Government, testified that on December 2, 1921, he went to Woods' drug store in the Northern Hotel building, in Seattle, about ten o'clock at night; that Franzen was in the store some time before Bunker came in; that Franzen gave him two eight-ounce bottles of alcohol; that he saw Woods break a bottle of whiskey on the floor; that Franzen had a glass in his hand; that Bunker picked up two dollar bills and two dollars and two half-dollars. He admitted that he did not see Woods sell anything or give anything to anybody (Tr. p. 31).

Bowen, a police officer, testified that he was present at the drug store; that Franzen said, "There is the money now on the counter," and that Woods says, "You put it there;" that he took possession of the money; that Bunker handed him the two eight-ounce bottles of alcohol (Tr. p. 33).

F. Semple, a police officer, testified that Franzen had no liquor on his person when he went into

the drug store and that Bunker took two bottles off Franzen in the drug store; that Franzen said, "There is the money on the showcase;" that the money was lying on the showcase. He likewise saw no sale (Tr. p. 34).

Anderson, another witness, also said that he saw no sale made. He testified that Franzen was searched before he went into the drug store and that two bottles were taken off Franzen in the drug store; that he saw nobody sell any liquor and that he did not see the money (Tr. p. 35).

Arvid Franzen testified that on December 2, 1921, he was a stool-pigeon, employed by the prosecuting attorney; that he went to Woods' drug store about seven o'clock in the evening; that he asked Woods if he had any alcohol for a spirit compass and he said he had; that he bought a small bottle of alcohol, about eight ounces, and paid a dollar for it; that he went back about ten o'clock in the evening—the time testified to by the other officers—and asked Woods if he had some more of the same kind of alcohol; that Woods gave him two bottles of alcohol, and the officers rushed in and took the two bottles from his hip pocket. Two bottles of grain alcohol are here shown the witness and he refuses

to identify them (Tr. p. 38). He testified that the officers "got mad" when they couldn't find any money on Woods and couldn't find any money in the till; that he went out of the drug store and had the marked money in his hand; that he went in again with it and handed it to Bunker. He denied that he told anybody the money was on the counter. He said that he said to Bunker, "Here is the money," and put it in Bunker's hand. He testified that the money was never out of his hand and he did not give Woods any money (Tr. p. 39).

On cross-examination Franzen testified that early in the evening he went down and asked Woods for some alcohol for a spirit compass, and that Woods put something in the alcohol, poured it out from another bottle. He testified also:

"After we got back to the dry squad room I said, 'Woods didn't get the money,' and Bunker said, 'I know that, but you have to say he did so we can stick him. We won't be able to stick him unless you do.' The bottles I got from Woods that day I have them with me now. (The bottles marked for identification Defendant's Exhibits 'A,' 'B' and 'C')" (Tr. p. 40).

These three bottles contained medicated alcohol and carried on their face the label "poison," and the formula.

Franzen further testified:

"These are the three bottles that I bought there that day. They are in the same condition as when I bought them, except the liquor has been emptied out. I told Mr. Allen (the assistant district attorney who was prosecuting the case) in February that I had emptied the liquor out, and that the bottles they had as evidence were not the ones I got. Mr. Allen sent for me on the 13th of February, and I told him then that I would not stand for any framing up of Woods and unless I could testify truthfully I would be a better witness for the defense than I would for the prosecution, that they had tried to make me testify the way they wanted it. I told them I had three empty bottles at home, and the bottles at home were the ones I bought from Woods and the ones the dry squad had were not the ones I bought from Woods. When I bought them I made a jocular remark about sailors drinking the spirits out of compasses, and Woods said, 'If they drink that it will be the last they will drink.' He said that when he sold it to me" (Tr. pp. 40-41).

"Early that evening, I was waiting for a man named Stites—I was told to work under Stites—Anderson said to me, 'Do you know Jimmie Woods?' I said, 'No.' The name didn't strike me at the time. He said, 'Do you know the Northern Drug Store?' I said, 'Yes.' He said, 'I want you to go down there and make a buy from that son-of-a-B. He got Keefe and I want to get him before he gets me.' Keefe was one of the dry squad. Nobody searched me before I entered the drug-store. I was never searched while I was in the employ of the authorities, this night or any other time. The second time I was in the drug-store I never gave any money to Woods. The bottle broken on the floor was broken by Bowen or Bolton, I am not sure. I was in the drug-store alone when I bought the first bottle for the spirit compass. I brought it back to the dry squad room but did not turn it in. I have had it in my possession ever since" (Tr. p. 41).

"I took these bottles and whatever packages of salts we had and destroyed all of it on account of having those little children at home. The youngest is not yet six. I have six children at home. These three bottles are the only ones I got from Woods' drug-store that day. I poured the liquor out the

same time I poured out the Epsom salts. In the District Attorney's office yesterday, Mr. Allen asked who was the leader, who had started this trial, and Anderson spoke up and said he guessed he was, and when he had got a little further along in his testimony and came to me being searched, I asked Mr. Allen not to pay any attention to Anderson, that he was committing perjury, that I had not been searched. We had a few words over it and I refused to say anything further in there and told Allen to let me see the affidavit that I had signed but had never read. I made notes of that on the back. After they couldn't get anything out of me to compare with the testimony of the police officers, I said I would like to be excused. Allen said, 'Can't you fellows get together in an amiable way and bring this thing out?' He said he had a good case against Woods if we would all come in and tell the same tale. It is my experience that they frame testimony in these cases right along (Tr. p. 42). I have a book here that I bought when I went to work for the dry squad, with certain places I was told to knock over. I was told they were no good and I marked them so. I was offered a bonus for giving testimony to convict Woods. I was paid twenty dollars for it and Stites grabbed five of it.

I got twenty-five dollars bonus, and Stites got five of it. Lt. Haig of the dry squad gave me ten dollars as a bonus, and probably two or three weeks after the raid Stites came and pulled out two five-dollar bills and said that patrolman Keefe had given him ten dollars, and handed me five. When I came back from British Columbia, probably a month after that, Keefe said, 'How much do I owe you, ten?' And I said, 'No, five.' I got twenty dollars bonus in addition to my salary and they gave Stites ten dollars. I was only on the job a few days. I quit because I wouldn't stand to work at that class of work—to frame people. I worked fourteen days. I never drank out of a glass like that down at Woods' place. I told the prosecuting attorney that the bottles I purchased from Woods were at home and that I had poured out the contents. I told Mr. Allen that it was a frame-up and told him the bottles I purchased from Woods were at home" (Tr. p. 43).

A. B. Stites testified that he was present at the drug store; that he saw Woods hand two bottles to Franzen; that he saw Franzen take a drink from a glass; that he saw no money on the counter (Tr. p. 49).

On cross-examination (Tr. p. 49) he testified that he gave Franzen a bonus of twenty dollars. "I got twenty dollars from Capt. Haig; he gave me the bonus and I gave it to Franzen" (Tr. p. 50).

On redirect examination the court asked the witness what the bonus was given for.

"A. I have to tell of one case of that—

Mr. DORE.—Some other case he wants to tell about.

A. Whenever they have beat them before, they have to offer a bonus to get that bootlegger.

The COURT.—I want to know what the bonus was for, for the purpose of giving testimony to establish a fact which is not true?

A. No, sir, it was not.

Q. (By the COURT.)—What was the object of the bonus?

A. If he made a buy and got the information on this man, he got the bonus.

Q. (By the COURT.)—If he didn't get it, what then?

A. He was paid his regular salary.

Mr. DORE.—That is pretty bright.

WITNESS.—He was under pay anyway.

Q. (By Mr. DORE.)—He was under what?

A. Five dollars a day.

Q. (By the COURT.)—Then, if a man is convicted, then he gets more?

A. On this one buy, yes. On certain places there is a bonus on it. Ranges from five to twenty dollars'' (Tr. pp. 51-52).

In the presence of the jury the court made the following statement:

The COURT.—"I want to make this observation: I think, in view of the testimony of this man Franzen upon the witness-stand to-day, that there is a matter here that ought to be examined into by the County grand jury, and a matter here that should, perhaps, get the attention of the Federal grand jury when it is convened. I wish that your office would see that this matter is called to the attention of Major Douglas, the county attorney, and I wish the jurors—the notes are being taken here—the testimony is taken in shorthand and this can be extended and transcribed, and the matter

ought to have the attention of the Federal grand jury, and I will so direct" (Tr. p. 52).

Jacobson, the City chemist, testified that the contents of Government's Exhibits contained thirty-nine percent of alcohol and could have been used for beverage purposes (Tr. p. 53).

O. R. Bolton testified that he was a police officer; that he went to Woods' place of business at ten o'clock; that Woods came towards the front of the store; that he saw two bottles taken off Franzen; that he also saw a broken bottle that had once contained whiskey; that he saw the money on the showcase; that Franzen pointed to the money and said, "Right there is the money" (Tr. pp. 53-54).

The Government then rested (Tr. p. 54), and the court asked the witness:

"Mr. Bolton, did you get a bonus to come in and testify?

A. Absolutely not.

The COURT.—In this case?

A. No. sir" (Tr. p. 54).

The court then asked to have the witness Anderson called in, whereupon the witness Anderson testified as follows:

(Questions by the COURT.)

"Q. Something was said about a bonus that has been paid to some persons. Did you get a bonus?

A. No, sir.

Q. —to testify in this case—anything with relation to a bonus?

A. No, sir.

Q. (By Mr DORE.)—You know the bonus is paid, don't you?

A. Lots of times money is paid these fellows extra for getting places that is noted for being protected by the police.

Q. Haig pays them extra for getting places noted for being protected by the police?

A. Yes, sir.

Q. (By Mr. ALLEN.)—Mr. Anderson, does that have relation to your testimony, or your work as investigator?

A. We don't have anything to do with those bonuses" (Tr. p. 55).

A. B. STITES, recalled for further examination by direction of the Court, testified as follows:

(Questions by the COURT.)

"Q. I want to ask you whether this bonus that you testified about a while ago, whether that obtains to the police officers?

A. No, sir.

Q. To whom does it apply?

A. Why, the agent that made the buy there.

Q. Just to him and to him alone?

A. To him alone" (Tr. p. 56).

Woods, the defendant, testified that the bottles marked Defendant's Exhibit "A," "B," and "C" were sold to Franzen; that formula number one is bichloride of mercury one part and alcohol two thousand parts, and that it is one of the formulas prescribed by the Government. He denied that the bottle of whiskey belonged to him. He testified that when policeman Bolton was down in Judge Dalton's court room, when he was being tried for extorting money from Japanese that he (Bolton) said he was sorry for having brought the bottle in to Woods' place; that Bolton was being tried along with officer Bowen, and they both told him they were sorry they had brought the bottle in (Tr. pp. 56-57).

Woods testified on cross-examination:

"I sold Franzen two bottles of medicated alcohol at ten o'clock. I got five dollars from him for the two bottles. I put the money in the cash register. Franzen said he wanted it for a spirit compass" (Tr. p. 57).

It is conceded that the twenty-four ounces of liquor described in Count I (the possession count) was composed of the sixteen ounces which Franzen contended that he bought at ten o'clock and the eight ounces that he bought at seven o'clock. The sale count (Count III) describes the sixteen ounces that Franzen claims he bought at ten o'clock. The jury by their verdict found that Woods did not possess the sixteen ounces of liquor described in Count I that he is alleged to have sold in Count III.

It must be borne in mind that Woods is not charged in Count I with the possession of the distilled spirits alone; he is charged with having possessed twenty-four ounces of distilled spirits or alcohol, with the intention of selling the same, contrary to the National Prohibition Act. The jury by their verdict found that he did sell the sixteen ounces, contrary to the National Prohibition Act.

The first question for determination in this case is, whether the verdict that finds a defendant sold certain described liquor, and also finds that he did not possess the identical liquor with the intention of selling it—though the jury found in fact that he did sell it—is consistent or inconsistent. It is the contention of the plaintiff in error that the verdict is void on account of inconsistency; that a man cannot be guilty of selling liquor and be innocent of possessing the identical liquor with the intention of selling the same.

In the case of *Rosenthal vs. United States,* 276 Fed. 714, this court held that where one count of an indictment charged a defendant with having bought or received stolen property, with knowledge that it was stolen, and another count charged him with having the same property in his possession with like knowledge, were based on the same transaction, and the evidence showed only one transaction, a verdict finding the defendant not guilty on the first count and guilty on the second count was wholly inconsistent and required a reversal. In that case the court says, at page 715:

"The difficulty is that there was but one transaction involved in the two counts of the indictment,

which was based upon the statute mentioned, and, according to the evidence, but one transaction between the plaintiff in error and the thieves. By its verdict upon the first count of the indictment the jury found that the plaintiff in error neither bought nor received the cigarettes from them with knowledge of the theft, and by its verdict upon the second count that the plaintiff in error was at the same time and place in possession of the property with such guilty knowledge. The two findings were thus wholly inconsistent and conflicting."

In the case of *Baldini vs. United States*, 286 Fed. 133, this court, referring to the *Rosenthal* case with approval, said:

"Counsel for the Government rightly concede that, if the two counts related to the same transaction, the position taken on behalf of the plaintiff in error is valid" (p. 134).

A case exactly in point is *Kuck vs. State,* 99 S. E. 622. It will be seen that the *Kuck* case is a case where the defendant was found guilty of selling liquor. Quoting from the decision:

"The offense of having, controlling, and possessing spirituous liquors in this state, as alleged in

the second count, could be committed without making a sale of the spirituous liquors; but the offense of selling, which contemplates delivery within the meaning of the prohibition statutes as the culminating feature of the sale, could not be committed without having, controlling, or possessing liquors. There would be no inconsistency or repugnancy in the verdict of guilty under the second count and not guilty under the first count, but there would be inconsistency and repugnancy in a verdict of guilty under the first count and not guilty under the second count; for, if there were no 'having, controlling, or possessing,' there could be no 'selling.' In the latter instance the repugnancy is as complete as in the case of *Southern Ry. Co. vs. Harbin,* 135 Ga. 122, 68 S. E. 1103, 30 L. R. A. (N. S.) 404, 21 Ann. Cas. 1011, where on account of repugnancy a verdict was set aside. The verdict found damages against the railroad and no liability against its employe in operating the engine of the company."

2 Bishop New Criminal Procedure, sec. 1015a (5):

"No form of verdict will be good which creates a repugnancy or absurdity in the conviction."

16 Corpus Juris, sec. 2596-5:

"A verdict on several counts must not be inconsistent."

Other examples of where inconsistent verdicts were not allowed to stand are:

Commonwealth vs. Haskins, 128 Mass. 60.

State vs. Rowe, 44 S. W. 266 (Mo.).

Toben vs. The People, 104 Ill. 565.

Southern Ry. Co. vs. Harbin, 68 S. E. 1103 (Ga.).

Sipes vs. Puget Sound Electric Co., 54 Wash. 55.

Doremus vs. Root, 23 Wash. 710.

It must be borne in mind that under the National Prohibition Act a druggist cannot possess alcohol legally unless he holds a permit from the National Prohibition Director. There is no testimony in this case that Woods ever had a permit. If he was in possession of any unmedicated alcohol, as the Government contended, under the condition of this record he possessed it illegally, as the burden was upon him to show his license to possess it, which he failed to do. At no place in the record can any mention of a permit be found. The mere fact that Woods was a druggist gave him no authority, under

the National Prohibition Act, to possess alcohol. He must possess it under a permit. The burden is upon him to show that he has a permit. This fact was overlooked by the trial court in his memorandum decision denying a new trial. His decision is fallacious for another reason; because the twenty-four ounces of liquor mentioned in Count I of the indictment is the identical liquor that the Government contends he sold to Franzen. Under the National Prohibition Act he could not sell any alcohol, such as Count I alleges was sold, unless Franzen presented a prescription; and the record contains an affirmative denial that Franzen had a prescription. So that, if the liquor was sold at all, as the jury found it was, then the possession was for the purpose of sale, as a man is taken to intend the thing that he does.

It is absolutely impossible to find any reasoning of law to support the finding that a man sold a quantity of liquor, and a simultaneous finding that he did not possess the liquor that he sold with the intention of selling it. The sale, if it did take place, was an indication of possession. Here again the trial court was in error in overlooking this fact. The memorandum decision of the trial court itself

concedes that the liquor described in Count I and the liquor described as the subject of the sale in Count III is the identical liquor.

The statement of the court in his memorandum decision, that the defendant admitted having alcohol, but being a druggist he could lawfully possess it, and that the jury was so instructed, is erroneous. No such instruction was given, and the statement that a druggist can lawfully possess alcohol, under the condition of this record, is also untrue; because a druggist can only possess liquor when he has a permit to possess it, and then can only possess it in the quantity described in the permit, and the burden is upon him to show such a permit.

Even if a druggist had a permit to possess one hundred gallons of alcohol, and he made a sale of one hundred gallons without a prescription, the fact that he had a permit would not render him guiltless upon a charge of possessing alcohol with the intention of selling it. The fact that he sold it would prove his intent, and possession for such a purpose would not be lawful, permit or no permit. So, upon any consideration of the matter, the court is in error.

The verdict should not be permitted to stand for another reason: There was no evidence that Woods ever sold any liquor, except the testimony of Franzen. Franzen denied that he bought the liquor from Woods that the Government contends was sold to Franzen. The alcohol that Franzen testified that he got from Woods it is admitted was unfit for beverage purposes. The alcohol that the Government contends he bought was fit for beverage purposes. Franzen said he did not buy the alcohol that the Government contends he did buy—alcohol fit for beverage purposes. There was no evidence in the case whatsoever that contradicted Franzen in any particular.

It is true that Stites said he saw Woods pass some bottles over the counter and saw Franzen pass something to Woods. This is not in conflict with Franzen's testimony, that at the time mentioned Woods handed him two bottles of medicated alcohol, unfit for beverage purposes. A search of the record fails to disclose any testimony other than Franzen's as to what Woods gave him. It is impossible to look at this record and find any testimony to support a verdict of guilty of the sale of alcohol fit for beverage purposes.

The utmost that the defendant in error can claim that the record shows is a conflict between the testimony of Franzen, in minor details, and that of the other Government witnesses. Calling the Government's witnesses by name, Bunker testified positively that he did not see any sale; Bowen testified that he did not see any sale; Semple testified the same way; Stites testified the same. The only other witnesses that the Government had, outside of Franzen, testified the same way. It is true that Stites testified that he saw Woods pass some bottles to Franzen, and he saw Franzen pass something to Woods. Franzen testified that Woods passed him something, but save that they were two bottles of medicated alcohol, unfit for beverage purposes. Where is the testimony to support the verdict that Woods, with or without money, passed any alcohol fit for beverage purposes to Franzen? The defendant in error should be compelled to point out to the court where this testimony is in the record.

All of the circumstances of the trial show that it is a verdict that should not be allowed to stand. Franzen testified that the case was a "frame-up" and that he had so informed the district attorney. He testified that the officers had paid him twenty

dollars for giving testimony that would convict Woods. The money was given to him, it is admitted by the witness Stites, his immediate superior. It must be remembered that this money was in addition to his regular salary. Franzen described himself as a stool-pigeon. Certainly where a stool-pigeon is paid money over and above his salary for giving testimony to convict a defendant, and the defendant is convicted on such testimony, the court should be slow to allow such a verdict to stand. Of course the weight of the testimony and the credibility of the witnesses is for the jury, but this is a case that is an exception to any rule.

The court's investigation of the subject of a bonus in the presence of the jury, causing witnesses to testify that Woods had been arrested before and tried and acquitted, and also the statement that a bonus was given for the purpose of rewarding agents who succeeded in making purchases from bootleggers who were supposed to have police protection, was prejudicial to the defendant and had no place in the trial. If the court wished to investigate a collateral matter, the jury should have been excluded. The record shows (Tr. p. 50) at the conclusion of Franzen's testimony, the court tells

the jury that Franzen's testimony should be investigated by the grand jury of both the Federal and State courts, and directs that an investigation be made.

The motion for a directed verdict should have been granted.

For the errors herein the motion in arrest of judgment should be granted or in the alternative a new trial should be ordered.

Respectfully submitted,

JOHN F. DORE,

Attorney for Defendant.

No. 3991.

In the United States Circuit Court of Appeals

For the Ninth Circuit

JAMES H. WOODS,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HON. JEREMIAH NETERER, *Judge Presiding.*

BRIEF OF DEFENDANT IN ERROR

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United States Attorney,
DE WOLFE EMORY,
Special Assistant United States Attorney,
Attorneys for Defendant in Error.

Address: 310 Federal Building, Seattle, Wash.

SHERMAN PRINTING AND BINDING CO., SEATTLE, WASH.

"The defendant is charged in four counts with violation of the National Prohibition Act. Count 1, charges that on the 2nd day of December, 1921, he unlawfully possessed 24 ounces of distilled spirits and one quart of whiskey, etc.; count 2, that on the same day he unlawfully sold 8 ounces of the distilled spirits, etc.; count 3, that on the same day he unlawfully sold 16 ounces of said distilled spirits, etc., both sales being made to one A. Franzen; count 4, charges the defendant with maintaining a nuisance.

"Upon the trial there was testimony tending to show that the defendant is a druggist, and that he had in his possession 24 ounces of alcohol, and that at some time during the day he sold Franzen 8 ounces of alcohol, and at another time 16 ounces of alcohol. A verdict of not guilty was directed as to count 4. The jury returned a verdict of not guilty as to counts 1 and 2, and guilty as to count 3. The defendant has moved in arrest of judgment on the ground that a verdict of not guilty as to count 1 is an acquital on count 3; and a motion for a new trial upon various grounds, among which, that the verdict of not guilty returned on count 1 is inconsistent with the verdict of guilty on count 3. This is the only ground in the motion meriting consideration.

"*Count 1, charges the defendant with the unlawful possession of 24 ounces of alcohol. The defendant admitted having the alcohol, and being a druggist he could lawfully pos-*

sess it, and the jury was so instructed. Count 2 and 3 charges the unlawful selling. The defendant could lawfully sell alcohol. He contended the sale was lawful. The verdict of not guilty as to the possession merely found that the defendant was not in unlawful possession, and guilty as to count 3 the jury found that he unlawfully sold. The verdict is not inconsistent, and is in harmony with the instructions given by the court, and is not out of harmony with Rosenthal v. U. S. 276 Fed. 714, upon which the defendant relies. The verdict merely finds that the defendant unlawfully sold what he lawfully possessed. The motions are denied."

Defendant, in his criticism of the logic of this decision, is first confronted with the cardinal rule that:

> "An argument based on inconsistency and repugnancy in verdicts is not favored in the law."
>
> *Davey v. U. S.*, 208 Fed. 237 (C. C. A., 7th Cir.);
>
> *U. S. v. Tyler*, 7 Cranch, 285, 3 L. E. 344.

Is, then, the jury's verdict of "not guilty" as to the unlawful possession of the alcohol, when viewed in the light of the testimony and the court's instructions, plainly at odds with its verdict of guilty as to the sale of a portion of this alcohol? We think not. Defendant was a retail druggist and phar-

macist. On the stand he admitted the possession and sale of the alcohol but testified that when he sold the alcohol it was medicated in accordance with one of the formulae prescribed by the Government, viz.: Formula No. 1, providing for one part of bichloride of mercury to 2,000 parts of alcohol and that the bottles bore the "poison" labels required by the Government (Tr. pp. 56 and 57). The witness had reference to Section 61, Regulations 60, promulgated by the Commissioner of Internal Revenue pursuant to authority vested in him by the National Prohibition Act, providing that:

> "Wholesale and retail druggists or pharmacists may medicate alcohol in accordance with any of the seven formulae listed below:
>
> 1. Bichloride of mercury, 1 part; alcohol, 2,000 parts. * * *
>
> (b) Retail druggists or pharmacists may sell such medicated alcohol, in quantities not exceeding one pint, for other than internal use *without physician's prescriptions* * * * provided that in each case the container of such medicated alcohol bears a 'poison' label."

The very gist of the defendant's defense was that, admitting the possession and sale of the alcohol, still as a retail druggist and the holder of a Federal Permit to use alcohol (for he could not lawfully sell alcohol in any form without such permit), he

was authorized by the Regulations above quoted, to possess alcohol and to sell alcohol, in its medicated form, in quantities not exceeding one pint, to any who might desire to purchase. The court recognized this theory of the defense, saying to the jury in its instructions (St. p. 83):

> "You are instructed that the defendant had a right, as a dealer in wholesale and retail drugs, and pharmacist, to sell medicated alcohol in accordance with certain formulas which are listed in the rules and regulations, and the formula under which it is claimed this was sold, under Formula No. 1, that is, by bichloride of mercury one part, and alcohol 2,000 parts."

Plainly, the jury was led to believe, by the defendant's testimony and the portion of the instructions noted, that a druggist might lawfully possess, and under some circumstances, sell alcohol.

Defendant will not now be heard to say that the record discloses a situation making the lawful possession of the alcohol by him impossible. He cannot now, with any semblance of consistency say that he was not the holder of a permit to use alcohol as a druggist. It is true, as counsel argues, that the fact of sale is evidence of unlawful intent in possessing. But this was by no means binding on the jury and as the verdict stands, it is plain that

the jury was more impressed with the contention that the possession was lawful. As remarked by the trial court, "The verdict merely finds the defendant unlawfully sold what he lawfully posessed."

The case of *Kuck v. State*, 99 S. E. 622, cited by defendant, is distinguishable on the facts, the defendant having there, so far as the decision discloses, made no claim of privilege as to the possession and sale of the liquor involved. Of the remainder of the cases cited by defendant as sustaining his position in this regard, *Tobin v. People*, 104 Ill. 565, and *Commonwealth v. Haskins*, 128 Mass. 60, hold that a verdict of guilty of (1) larceny of a chattel and (2) receiving same chattel knowing it to have been stolen, is inconsistent because "in law the guilty receiver of goods cannot himself be the thief;" *Southern Ry. Co. v. Harbin*, 68 S. E. 1103 (Ga.); *Sipes v. Puget Sound Electric Co.*, 54 Wash. 47, 102 Pac. 1057; and *Doremus v. Root*, 23 Wash. 710, 63 Pac. 572, hold merely that in a civil action, against master and servant, for damages for a tort committed by the servant, a judgment against the master is inconsistent with judgment in favor of the servant. *State v. Rowe*, 44 S. W. 766, deals with an ambiguous rather than an inconsistent verdict. None of these cases aid in the solution of the point at issue.

We have been able to find no cases more nearly in point than *Gee Woe v. U. S.*, 250 Fed. 428 (C. C. A. 5th Cir.) (Certiorari denied, 39 Sup. Ct. 8; 248 U. S. 562; 63 L. E. 422), *Panzick v. U. S.*, 285 Fed. 871, and *Lowenthal v. U. S.*, 274 Fed. 563 (C. C. A. 6th Cir.). In the *Gee Woe* case, *supra*, it was held that a conviction on a charge of being a dealer in opium without having registered was not inconsistent with an acquittal on a charge of making a sale of opium. In the *Panzick* case, *supra*, an acquittal on a charge of liquor selling was held not inconsistent with conviction of a charge of maintaining a common nuisance contrary to the National Prohibition Act. In the *Loewenthal* case, *supra*, an acquittal on a count charging defendant with having unlawfully obtained morphine for the purpose of sale as a dealer was held not inconsistent with defendant's conviction of the sale of some of such morphine as a dealer without having registered.

We are asked by defendant to point out the testimony which sustains the jury's verdict. Franzen's person was searched before he was sent into defendant's drug store to make the purchase and no bottles or liquor found. Both Anderson and Semple testified to this (Tr. pp. 34 and 36). After Franzen entered, defendant was seen by Stites to pass

Franzen two bottles and the latter to pass to the defendant what the witness took to be money (Tr. p. 49). Franzen then gave the pre-arranged signal that he had made the purchase (Tr. p. 31). The police officers then entered and Bunker took from Franzen two eight-ounce bottles of alcohol (Tr. p. 31) which was fit for use for beverage purposes (Tr. pp. 36 and 53). The marked money previously given Franzen was on the counter and was pointed out by Franzen who said, "There it is; Mr. Woods put it there now" (Tr. p. 35). The defendant himself did not deny the sale but contended only that the alcohol was not fit for use for beverage purposes (Tr. p. 56).

Limited space prevents us from saying all we should like concerning the witness Franzen, who, if his own statement is to be believed, was a stool pigeon and the recipient of fees to give false testimony. Suffice it to say that defendant has no cause for complaint at his testimony. Franzen testified that he "would be a better witness for the defense than he would for the prosecution" (Tr. p. 40), and that this was the case a reading of the Transcript, pages 39 to 43, will show.

The trial court's investigation of the subject of bonus in the presence of the jury is not reversible

error for several reasons: (1) No objection was made to this procedure by counsel, in fact he participated in it (Tr. p. 51); (2) Counsel, in his cross examination of the witness Franzen (Tr. p. 43) and then of the witness Stites (Tr. p. 50), first opened up this line of inquiry.

The court's admonition to the Assistant United States Attorney that Franzen's testimony should perhaps, get the attention of the Federal Grand Jury (Tr. p. 52), was the least the court could have done in view of the fact that Franzen's testimony was directly contradicted by the affidavit made by him in support of the information in this case (Tr. pp. 5 and 6). No objection was made to this by defendant and it is, therefore, not reversible error.

Rossi v. U. S., 278 Fed. 351 (C. C. A. 9th Cir.).

It is respectfully submitted that there is no error in the record and that the judgment should stand affirmed.

Respectfully submitted,

THOS. P. REVELLE,
United States Attorney,
DE WOLFE EMORY,
Special Assistant United States Attorney,
Attorneys for Defendant in Error.

No. 3991.

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES H. WOODS,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF WASHINGTON, NORTHERN DIVISION.

PETITION FOR REHEARING.

JOHN F. DORE,

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J. L. MACDONALD CO., PRINTERS AND PUBLISHERS, SEATTLE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES H. WOODS,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

No. 3991.

PETITION FOR REHEARING.

Comes now the plaintiff in error and petitions for a rehearing in this cause, and assigns the following reasons:

In the decision filed in this cause on June 18, 1923, the decisive point is correctly stated as calling for a determination of the question as to whether one cannot be guilty of selling liquor, and be innocent of possession of the idenitcal liquor with the intention of selling the same. After stating the question in dispute accurately this court says:

"That depends upon the facts."

The trouble with the decision rendered is that the basic facts are not those set forth in the record. In the opinion it states that the defendant is a druggist, and admitted having the alcohol in his possession. This statement is partly true, and partly false. The government in this case introduced in evidence three bottles of alcohol. This alcohol was grain alcohol and was concededly fit for beverage purposes. This is the alcohol which the government contended the defendant possessed, and it was this alcohol that the government contended that the defendant sold. The government's entire evidence related to this grain alcohol. The jury found that the defendant sold two bottles of this grain alcohol, and the jury found that the defendant did not possess these two bottles of grain alcohol. If the defendant sold the grain alcohol that the government contends he sold, then at the time he sold it he possessed that identical alcohol with the intention of selling it in violation of the prohibition law.

The possession of the alcohol with the intent to sell it, as to the matter of time, is coincident with the time of the sale. The information charges that at the moment that he sold it he possessed it with the intent to sell it, in violation of the law, and

that he did sell it in violation of the law. It would be no defense for the druggist to say I came into possession of this alcohol ninety days ago with the purpose of disposing of it according to law, in good faith, for medicinal purposes. Any court would instruct the jury that it made no difference whether his possession was legal or illegal prior to the time of sale. The evidence shows that the illegal possession and illegal sale were based upon the same period of time. How a person can sell intoxicating liquor, in violation of law, at a particular moment, and at the same moment possess the same identical intoxicating liquor with no purpose of violating the law, is impossible of solution. There is an apparent inconsistency between the two findings.

Where this court has gone wrong is, that it has overlooked the fact that the government introduced no evidence that the defendant ever possessed any alcohol, but the three bottles of grain alcohol. There was no evidence by any person that he ever had any other alcohol in his possession fit for beverage purposes. There is no evidence in the case that he ever had a permit to possess any alcohol whatsoever, of any kind or description. A druggist, by reason of his occupation, has no reason to possess alcohol or

other intoxicating liquor; he must have a permit to purchase it, and the evidence shows that the defendant never possessed a permit. The defendant never contended that he possessed any grain alcohol. The defendant at no time ever admitted that he had any alcohol fit for beverage purposes. The defendant contended that what he possessed was three bottles of medicated alcohol, introduced in evidence, bearing poison labels, and admittedly unfit for beverage purposes. If he possesed and sold these three bottles he was guilty of no offense whatsoever. If he possessed and sold the three bottles the government contended that he possessed he was guilty of both possession and sale. The decision overlooks the fact there were only six bottles in dispute. If the defendant sold the alcohol that he testified that he possessed, then he sold alcohol that was unfit for beverage purposes, and there would be no evidence in the case to sustain the verdict of a sale. So when the opinion says that the defendant admitted the possession of the alcohol, the statement is partly true, and partly false, because it omits to set forth what particular alcohol the defendant admitted he had. This was the fact the trial court overlooked.

A careful analysis of the evidence, bearing in mind at all times there were only in this case six bottles of alcohol—three bottles of poison alcohol, unfit for beverage purposes, which the defendant admitted he possessed and sold, and three bottles of grain alcohol, fit for beverage purposes, which the government contended by its information he possessed with intent to sell in violation of law, and which the government contends, and the jury found, that he did sell in violation of law.

If this honorable court will set down at the head of the opinion the fact, as the evidence shows, there were only six bottles in dispute, the matter will clear itself up.

A rehearing should be granted, or at least the opinion should be re-written, unless this court wishes to adopt the practice of deciding cases on matters that are absolutely outside of the record. In the opinion an instruction of the trial court is set forth, but the transcript of the record contains no instructions whatsoever. As the basis for the decision the purported instructions of the trial court are set forth. An examination of the transcript will show there are no instructions in it. It has always been

the rule of this Circuit, and every other Circuit, that cases would be decided on what appeared in the transcript of record. There are no instructions in the transcript.

For the foregoing reasons plaintiff in error respectfully contends that he should be granted a rehearing.

JOHN F. DORE,

Attorney for Plaintiff in Error.

I, John F. Dore, attorney for Plaintiff in Error, hereby certify that in my judgment the petition for a rehearing is well-founded, and that it is not interposed for delay.

JOHN F. DORE,

Attorney for Plaintiff in Error.

No. 3993

United States

Circuit Court of Appeals

For the Ninth Circuit.

F. L. DENMAN,

Plaintiff in Error,

vs.

CHARLES RICHARDSON,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 3993

United States
Circuit Court of Appeals
For the Ninth Circuit.

F. L. DENMAN,

Plaintiff in Error,

vs.

CHARLES RICHARDSON,

Defendant in Error.

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Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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IVEY, J. N., 1309–16 Hoge Building, Seattle, Washington,
Attorney for Defendant in Error. [1*]

In the Superior Court of the State of Washington in and for the County of Pierce.

No. 2791.

FREDERICK L. DENMAN and FREDERICK L. DENMAN as Agent and Attorney in Fact for CHARLES A. MILLER, A. H. DENMAN, PERCY E. RADLEY, J. H. WRENTMORE, W. BOYD SHANNON, J. HUNTER RAMSEY, W. ARCHIBALD, F. C. HEWSON and THOMAS LARSEN,
Plaintiffs,

vs.

CHARLES RICHARDSON,
Defendant.

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*Page-number appearing at foot of page of original certified Transcript of Record.

Complaint.

Come now the above-named plaintiffs and complaining of the above-named defendant for a first cause of action, allege as follows:

I.

That on and prior to January, 1912, and at all times hereinafter mentioned, the Pacific Cold Storage Company was a corporation organized and existing under and by virtue of the laws of the State of Washington, with its principal place of business in Tacoma, Pierce County, Washington, and that Charles Richardson acted as president of said company, and drew a salary as such president from January 1st, 1912, until the first day of October, 1918, and as one of the trustees actively managing the affairs of said company from January 1st, 1912, to date.

II.

That the corporation had a capital stock of Ten Thousand (10,000) shares, of the par value of One Hundred ($100.00) Dollars each, or One Million ($1,000,000.0) Dollars, [2] and that the following named parties are now, and at all times herein mentioned were, the lawful owners of the number of shares set opposite their respective names, to wit:

Charles A. Miller	798 Shares
A. H. Denman	40 Shares
Percy E. Radley and J. H. Wrentmore	125 Shares
W. Boyd Shannon	50 Shares
J. Hunter Ramsey	40 Shares

W. Archibald .....186 Shares
F. C. Hewson ..... 1 Share
Thomas Larsen ..... 25 Shares
Frederick L. Denman ..... 60 Shares

and that each one of the parties above named duly made, constituted and appointed Frederick L. Denman as their agent and attorney in fact to bring the above-entitled action, and take such other and further legal steps as might seem proper in the premises.

III.

That while acting as said president and trustee of said corporation, said Charles Richardson wilfully, wrongfully and unlawfully converted to his own use, the following sums of money from the dividends of said company, on the following dates, to wit:

Date.	Amount Taken.	Dividend.
January 1912	$2,500.00	$100,000.00
January 1913	2,500.00	100,000.00
January 1914	2,500.00	100,000.00
January 1915	1,500.00	60,000.00
January 1916	2,000.00	80,000.00
January 1917	2,000.00	80,000.00
January 1918	5,000.00	200,000.00
Total taken	$18,000.00	
on total dividends		720,000.00

[3]

And that from January 1st, 1912, to and including January, 1918, the said defendant Charles Richardson, without any consideration, wilfully, wrong-

fully and unlawfully converted to his own use the dividends of the following parties in the amounts set opposite their respective names, to wit:

Charles A. Miller	$1,436.40
Fredrick L. Denman	108.00
A. H. Denman	72.00
Percy E. Radley and J. H. Wrentmore	225.00
W. Boyd Shannon	90.00
J. Hunter Ramsey	72.00
W. Archibald	334.80
F. C. Hewson	1.80
Thomas Larsen	45.00

and that there is now due Fredrick L. Denman, individually, on account thereof, the sum of One Hundred Eight ($108.00) Dollars, and as agent and attorney in fact of the above-named shareholders, the total sum of Two Thousand Two Hundred Seventy-seven ($2,277.00) Dollars.

And plaintiff further alleges as a second cause of action, as follows:

I.

That on, and prior to January, 1912, and at all times hereinafter mentioned, the Pacific Cold Storage Company was a corporation organized and existing under and by virtue of the laws of the State of Washington, with its principal place of business in Tacoma, Pierce County, Washington, and that Charles Richardson acted as president of said company, and drew a salary as such president from January 1st, 1912, until the first day of October, 1918, and as one of the trustees actively

managing the affairs of said company from [4] January 1st, 1912, to date.

II.

That the corporation had a capital stock of Ten Thousand (10,000.00) shares, of the par value of One Hundred ($100.00) Dollars each, or One Million ($1,000,000.00) Dollars, and that the following named parties are now, and at all times herein mentioned were, the lawful owner of the number of shares set opposite their respective names, to wit:

Charles A. Miller .....798 Shares
A. H. Denman ..... 40 Shares
Percy E. Radley and J. H. Wrentworth .....125 Shares
more .....125 Shares
W. Boyd Shannon .....50 Shares
J. Hunter Ramsey .....40 Shares
W. Archibald .....186 Shares
F. C. Hewson ..... 1 Share
Thomas Larsen .....25 Shares
Fredrick L. Denman .....60 Shares

and that each one of the parties above named duly made, constituted and appointed Frederick L. Denman as their agent and attorney in fact to bring the above-entitled action, and take such other and further legal steps as might seem proper in the premises.

III.

That the Pacific Cold Storage Company did no new business after May 1st, 1918, and on May 31st, 1918, the stockholders unanimously voted to dissolve

said corporation, and said company was in process of liquidation from then on until July 1st, 1919, and that on September 15th, 1918, the trustees paid to the shareholders of said company Five Hundred Thousand ($500,000.00) Dollars of the capital return of said Pacific Cold Storage [5] Company, and on June 3d, 1919, said trustees paid the sum of Five Hundred Thousand ($500,000.00) Dollars of said capital return, and that on January 1st, 1919, the said Charles Richardson, while acting as trustee of said company, without any consideration whatever, wrongfully and unlawfully appropriated to his own use, the sum of Twenty-five Thousand ($25,000.00) Dollars of the capital stock of said company, and on June 3d, 1919, said Charles Richardson while acting as such trustee, misappropriated the sum of Twenty-five Thousand ($25,000.00) Dollars of said capital stock, and that on January 1st, 1919, and on June 3d, 1919, the said Charles Richardson, while acting as trustee of said company, without any consideration, wilfully, wrongfully and unlawfully misappropriated from the capital stock belonging to Charles A. Miller, Fredrick L. Denman, A. H. Denman, Percy E. Radley, J. H. Wrentmore, W. Boyd Shannon, J. Hunter Ramsey, W. Archibald, F. C. Hewson and Thomas Larsen, the sum of Six Thousand Six Hundred Twenty-five ($6,625.00) Dollars, and that there is now due and owing Fredrick L. Denman, individually on account thereof, the sum of Three Hundred ($300.00) Dollars and Fredrick L. Denman, as the agent and attorney in fact of Charles A. Miller, and the other stock-

holders just above named the sum of Six Thousand Three Hundred Twenty-five ($6,325.00) Dollars.

WHEREFORE Fredrick L. Denman prays judgment against Charles Richardson in the sum of Four Hundred Eight ($408.00) Dollars, and Fredrick L. Denman, as the agent and attorney in fact for Charles A. Miller, and the other stockholders for whom he is agent, above named, in the sum of Eight Thousand Six Hundred and Two ($8,602.00) Dollars.

GEORGE P. FISHBURNE,
Attorney for Plaintiffs.

Office and Postoffice Address: 608 National Bank of Tacoma Bldg., Tacoma, Washington. [6]

A. H. DENMAN,
Attorney for Plaintiffs.

Office and Postoffice Address: National Realty Bldg., Tacoma, Washington.

[Indorsed]: Filed in the United States District Court, Western District of Washington. Oct. 3, 1919. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy Clerk. [7]

Answer.

Comes now the defendant Charles Richardson by his attorneys, Kerr & McCord, and for answer to the complaint of plaintiffs, says:

I.

Referring to paragraph one of the first cause of action, he admits the allegations therein contained.

II.

Referring to paragraph two of said first cause of action, he admits that the corporation therein referred to had a capital stock of ten thousand shares and denies each and every other allegation therein contained.

III.

Referring to paragraph three he denies each and every allegation therein contained, and denies that he converted either the amounts set opposite the names of the parties in said paragraph, or any other sum or sums whatsoever.

IV.

Referring to paragraph one of plaintiffs' second cause of action, he admits the allegations therein contained. [8]

V.

Referring to paragraph two of plaintiffs' second cause of action, he admits that the corporation therein referred to had a capital stock of ten thousand shares, and he denies each and every other allegation in said paragraph contained.

VI.

Referring to paragraph three of said second cause of action, he denies each and every allegation therein contained and denies specifically that he appropriated the sum of $25,000.00 of the capital stock of said company, or any other amount of said capital stock and denies specifically that he misappropriated the sum of $6,625.00 therein referred to, or any other sum or sums whatsoever, and denies

specifically that there is now due and owing plaintiffs on account of the matters and things therein referred to the sum of $6,325.00 or in any other sum or sums whatsoever.

WHEREFORE, having fully answered, this defendant prays the Court that this action be dismissed with his costs and disbursements.

KERR & McCORD,
Attorneys for Defendant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Dec. 1, 1919. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [9]

Demurrer to Amended Complaint.

Comes now the defendant above named and demurring to the amended complaint of the plaintiffs on file herein, for cause of demurrer alleges:

I.

That there is a defect of parties plaintiff.

II.

That there is a defect of parties defendant.

III.

That several causes of action have been improperly united.

IV.

That the complaint does not state facts sufficient to constitute a cause of action.

V.

That the action has not been commenced within the time limited by law.

KERR & McCORD,
Attorneys for Defendant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Mar. 3, 1920. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [15]

Demurrer to Fifth Amended Complaint.

Comes now the defendant above named and demurring to the first cause of action stated in the fifth amended complaint, for cause of demurrer, says:

I.

That there is a defect of parties plaintiff.

II.

That there is a defect of parties defendant.

III.

That several causes of action have been improperly united.

IV.

That the complaint does not state facts sufficient to constitute a cause of action.

V.

That the action has not been commenced within the time limited by law.

And further demurring to the second cause of action stated in the fifth amended complaint for cause of demurrer, this defendant alleges:

I.

That there is a defect of parties plaintiff.

II.

That there is a defect of parties defendant.

III.

That several causes of action have been improperly united.

IV.

That the complaint does not state facts sufficient to constitute a cause of action.

V.

That the action has not been commenced within the time [36] limited by law.

KERR, McCORD & IVEY,
Attorneys for Defendant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Sep. 15, 1921. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [37]

Order on Demurrer to Fifth Amended Complaint.

The Court having considered the demurrer to the fifth amended complaint and filed its opinion herein and finding that there is a misjoinder of parties plaintiff as to Frederick L. Denman and Frederick L. Denman as agent for A. H. Denman, F. C. Hewson and Thomas Larsen and that Frederick L. Denman has not capacity to sue for said A. H. Denman, F. C. Hewson and Thomas Larsen,—

WHEREFORE IT IS ORDERED that the above-entitled action as to Frederick L. Denman, as agent and attorney in fact for A. H. Denman, Thomas Larsen and F. C. Hewson, be and is hereby dismissed without prejudice and that the plaintiff Frederick L. Denman be allowed to file an amended complaint herein within ten days.

Done in open court this 26 day of September, 1921.

JEREMIAH NETERER,
Judge.

To the above ruling the plaintiffs and each one of them except on the following grounds:

I.

That the defendant waived his right to object to a misjoinder of the parties plaintiff by moving for the transfer of this case from the state to the Federal court on the ground of diversity of citizenship of the plaintiffs and the defendant and that the amount in controversy exceeded $3,000.00 exclusive of interest and costs. The reason of this exception is that the claims of A. H. Denman, F. C. Hewson and Thomas Larsen are each far below $3,000.00 and do not even exceed $500.00 apiece and could not have been tried in the Federal court unless they had been joined with other claims, which brought them to $3,000.00 and over. The defendant took advantage of the misjoinder to gain federal jurisdiction and then attempts to throw the plaintiff out of court [38] because of this same misjoinder.

II.

That the defendant by his own laches has lost

his right to raise the objection *os* misjoinder of causes of action or the incapacity of any one of the plaintiffs to sue because if any one of the claims of the plaintiff are dismissed from this action he cannot begin a new suit on account of their being barred by the statute of limitations since this action was commenced, and on the further ground that this objection is known as a dilatory plea and that such pleas must not only be made but ruled upon at the beginning of an action so that plaintiffs can begin immediately a new action.

The above exceptions be and are hereby allowed this 26th day of September, 1921.

JEREMIAH NETERER,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Sep. 26, 1921. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [39]

In the District Court of the United States, Western District of Washington, Southern Division.

No. 2791.

FREDERICK L. DENMAN,
Plaintiff,

vs.

CHARLES RICHARDSON,
Defendant.

Seventh Amended Complaint.

The plaintiff complains of the defendant and for a first cause of action alleges:

FIRST CAUSE OF ACTION.

I.

That from the 8th day of April, 1897, until the first day of May, 1918, The Pacific Cold Storage Company was a corporation organized and doing business under the laws of the State of Washington having its principal place of business in the City of Tacoma in Pierce County in said state; that after May 1, 1918, said corporation ceased to do business and on May 31, 1918, at the regular annual meeting of the stockholders of said corporation for that year said stockholders voluntarily and unanimously voted to dissolve said corporation and instructed its officers and trustees to sell all of its property, collect all money due to it and distribute the proceeds and all accumulated funds to its stockholders; that from and after the first day of May, 1918, the said company did no new business and abandoned the purposes for which it was incorporated and disposed of an integral and major part of its assets and paid all of its debts and was dissolved on or before July, 1, 1919, and that a formal order of dissolution was made and entered on the 2d day of June, 1919, in the Supreme Court of the State of Washington in and for Pierce County. [48]

II.

That the capital of said corporation from and

after April 10, 1901, was the sum of One Million Dollars, divided into ten thousand shares of the par value of One Hundred Dollars each. That at the time said corporation ceased to do business Frederick L. Denman owned 60 of said shares; that said shareholder remained at all times since owner of the funds of said corporation to be distributed to him upon dissolution on his shares as such former stockholder.

III.

That during the existence of the said Pacific Cold Storage Company the profits realized from its business each year were in part declared to be dividends and to the amount so declared paid as dividends to the shareholders of said corporation; that the profits not so declared to be dividends were retained and accumulated by said company and at the time said company ceased to do business and dissolved were available for distribution and said accumulated profits were then distributed to said shareholders, with the exception of the portion unlawfully appropriated by defendant as stated in following paragraphs.

IV.

That in each year commencing with the year 1912 and ending with the year 1918 the defendant, without authority from said corporation, its trustees or its stockholders, and while acting as trustee and president, wrongfully and unlawfully misappropriated and converted to his own use from said accumulated funds and undivided profits an amount equal to two and one-half per cent of amount paid

to said shareholders as dividends, as follows, to wit: [49]

Date	Dividend	Amount Taken
January, 1912	$100,000.00	$2500.00
January, 1913	100,000.00	2500.00
January, 1914	100,000.00	2500.00
January, 1915	60,000.00	1500.00
January, 1916	80,000.00	2000.00
January, 1917	80,000.00	2000.00
January, 1918	200,000.00	5000.00
Total Dividends	$720,000.00	
Total taken by Defendant	$18,000.00	

V.

That of the amounts so wrongfully and unlawfully taken as above set forth there belonged to the stock of F. L. Denman and became due thereon from the defendant on dissolution of said corporation the sum of $108.00 and interest on said amount at the legal rate of six per cent per annum from and after the 31st day of May, 1918, the date of the dissolution of said company, which amount the defendant refuses to pay although demanded of him prior to the commencement of this action.

VI.

That complying with the order of the Court requiring plaintiff to state in his complaint the time when he acquired shares in said corporation plaintiff alleges: That the defendant and his attorneys now have in their possession and located in the office of defendant's attorneys all of plaintiff's certificates of stock together with the stock certificate book

and the stock ledger of said corporation whereby such times and amounts can be ascertained by them readily and with certainty. That F. L. Denman acquired his said 60 shares in amounts and about the times stated as follows, to wit: 1 share some time in the year [50] 1901; 39 shares in June, 1910; and 20 shares in April, 1912.

For a second cause of action against the defendant plaintiff alleges:

SECOND CAUSE OF ACTION.

I.

That from the 8th day of April, 1897, until the first day of May, 1918, The Pacific Cold Storage Company was a corporation organized and doing business under the laws of the State of Washington having its principal place of business in the City of Tacoma in Pierce County in said state; that after May 1, 1918, said corporation ceased to do business and on May 31, 1918, at the regular annual meeting of the stockholders of said corporation for that year said stockholders voluntarily and unanimously voted to dissolve said corporation and instructed its officers and trustees to sell all of its property, collect all money due to it and distribute the proceeds and all accumulated funds to its stockholders; that from and after the first day of May, 1918, the said company did no new business and abandoned the purposes for which it was incorporated and disposed of an integral and major part of its assets and paid all of its debts and was dissolved on or before July 1, 1919, and that a formal order of dissolution was made and entered on

the 2d day of June, 1919, in the Superior Court of the State of Washington in and for Pierce County.

II.

That the capital of said corporation from and after April 10, 1901, was the sum of One Million Dollars divided into ten thousand shares of the par value of One Hundred Dollars each. That at the time said corporation ceased to do business Charles A. Miller owned 798 of said shares; that said shareholders remained [51] at all times since owners of the funds of said corporation to be distributed to them upon dissolution on their shares as such former stockholders save and except only that Charles A. Miller transferred his interest in the subject matter of this action as stated in the following paragraph.

III.

That the said Charles A. Miller by assignment in writing made since the commencement of this action conveyed to said Frederick L. Denman all right, title and interest of said Charles A. Miller to claims against the defendant for which recovery is sought in this action, a copy of which said assignment is hereto attached marked Exhibit "A" and made a part of this complaint.

IV.

That during the existence of the said Pacific Cold Storage Company the profits realized from its business each year were in part declared to be dividends and to the amount so declared paid as dividends to the shareholders of said corporation; that the profits not so declared to be dividends were re-

tained and accumulated by said company and at the time said company ceased to do business and dissolved were available for distribution and said accumulated profits were then distributed to said shareholders with the exception of the portion unlawfully appropriated by defendant as stated in following paragraphs.

V.

That in each year commencing with the year 1912 and ending with the year 1918 the defendant, without authority from said corporation, its trustees or its stockholders, and while acting as trustee and president, wrongfully and unlawfully misappropriated and converted to his own use from said accumulated funds [52] and undivided profits an amount equal to two and one-half per cent of amount paid to said shareholders as dividends; as follows, to wit:

Date	Dividend	Amount Taken
January, 1912	$100,000.00	$2500.00
January, 1913	100,000.00	2500.00
January, 1914	100,000.00	2500.00
January, 1915	60,000.00	1500.00
January, 1916	80,000.00	2000.00
January, 1917	80,000.00	2000.00
January, 1918	200,000.00	5000.00
Total Dividends	$720,000.00	
Total taken by Defendant		$18,000.00

VI.

That of the amounts so wrongfully and unlawfully taken as above set forth there belonged to the

stock of Charles A. Miller and became due thereon from the defendant on the dissolution of said corporation the sum of $1436.40 and interest on said amount at the legal rate of six per cent per annum from and after the 31st day of May, 1918, the date of the dissolution of said company, which amount the defendant refuses to pay although demanded of him prior to the commencement of this action.

VII.

That complying with the order of the court requiring plaintiff to state in his complaint the time when he acquired shares in said corporation plaintiff alleges: that the defendant and his attorney now have in their possession and located in the office of defendant's attorneys all of plaintiff's certificates of stock together with the stock certificate book and the stock ledger of said corporation whereby such times and amounts can [53] be ascertained by them readily and with certainty. Said Charles A. Miller has owned 1058 shares of said capital, of which prior to the year 1918 he had 260 shares, leaving as hereinbefore stated 798 shares, which he has owned since April, 1917, and until his said conveyance to F. L. Denman; that to the best of plaintiff's information, knowledge and belief said Miller acquired his stock in amount and on or about the times stated as follows, to wit: 30 shares August 15, 1911; 100 shares December 9, 1911; 200 shares April 17, 1912; 100 shares March 19, 1913; 100 shares April 29, 1913; 100 shares October 17, 1913; 70 shares March, 1914; 100 shares March, 1914; 100

shares August 10, 1915; 158 shares March, 1917. That said Miller sold 80 shares in March, 1912; 100 shares in March, 1913; 15 shares in March, 1914, 15 shares in October, 1916, 20 shares in March, 1917; 25 shares in March, 1917; and 5 shares in April, 1917.

For a third cause of action against the defendant plaintiff alleges:

THIRD CAUSE OF ACTION.

I.

That from the 8th day of April, 1897, until the first day of May, 1918, The Pacific Cold Storage Company was a corporation organized and doing business under the laws of the State of Washington having its principal place of business in the City of Tacoma in Pierce County in said state; that after May 1, 1918, said corporation ceased to do business and on May 31, 1918, at the regular annual meeting of the stockholders of said corporation for that year said stockholders voluntarily and unanimously voted to dissolve said corporation and instructed its officers and trustees to sell all of its property, collect all money due it and distribute the proceeds and all accumulated [54] funds to its stockholders; that from and after the first day of May, 1918, the said company did no new business and abandoned the purposes for which it was incorporated and disposed of an integral and major part of its assets and paid all of its debts and was dissolved on or before July 1, 1919, and that a formal order of dissolution was made and entered on

the 2d day of June, 1919, in the Superior Court of the State of Washington in and for Pierce County.

II.

That the capital of said corporation from and after April 10, 1901, was the sum of One Million Dollars, divided into ten thousand shares of the par value of One Hundred Dollars each. That at the time said corporation ceased to do business Frederick L. Denman owned 60 of said shares; that said shareholder remained at all times since owner of the funds of said corporation to be distributed to him upon dissolution in proportion to his shares as such former stockholder.

III.

That while acting as such trustee for the shareholders after said company had ceased to do business, the defendant without any consideration whatever, wrongfully, and unlawfully appropriated to his own use from the capital return of said corporation, certain sums at the times and in the amounts stated as follows, to wit: In or about the month of January, 1919, the sum of $25,000.00; in or about the month of June, 1919, the sum of $25,000.00; and in or about the month of January, 1920, the sum of $2500.00, making a total of funds so misappropriated by the defendant, to his own use in the amount of $52,500.00. That the amount so taken was $5.25 for each share and included $315.00 belonging to F. L. Denman on his 60 shares. [55]

IV.

That there is now, therefore, due and owing from

the said Charles Richardson for money so had and received by him to the use of the plaintiff the sum of $315.00 together with interest at the legal rate of six per cent per annum on said amount from and after the month of January, 1920. That before the commencement of this action plaintiff demanded payment of the sum of money above set forth from the defendant, who has paid no part of the same.

V.

That the defendant has possession of and there is now in his custody in the office of his attorneys in this action all of plaintiff's certificates of stock together with the stock certificate book and the stock ledger of said corporation whereby the times and amounts when plaintiff became the owner of his said shares of stock can be ascertained by the defendant and his attorney readily and with certainty; that plaintiff has owned his said 60 shares since the month of April, 1912, when he acquired the last of his shares.

For a fourth cause of action against the defendant plaintiff alleges:

FOURTH CAUSE OF ACTION.

I.

That from the 8th day of April, 1897, until the first day of May, 1918, The Pacific Cold Storage Company was a corporation organized and doing business under the laws of the State of Washington having its principal place of business in the City of Tacoma in Pierce County in said state; that after May 1, 1918, said corporation ceased to do business and on May 31, 1918, at the regular an-

nual meeting of the stockholders of said [56] corporation for that year said stockholders voluntarily and unanimously voted to dissolve said corporation and instructed its officers and trustees to sell all of its property, collect all money due it and distribute the proceeds and all accumulated funds to its stockholders; that from and after the first day of May, 1918, the said company did no new business and abandoned the purposes for which it was incorporated and disposed of an integral and major part of its assets and paid all of its debts and was dissolved on or before July 1, 1919, and that a formal order of dissolution was made and entered on the 2d day of June, 1919, in the Superior Court of the State of Washington in and for Pierce County.

II.

That the capital of said corporation from and after April 10, 1901, was the sum of One Million Dollars, divided into ten thousand shares of the par value of One Hundred Dollars each. That at the time said corporation ceased to do business Charles A. Miller owned 798 of said shares and said shareholders remained at all times since owners of the funds of said corporation to be distributed to them upon dissolution in proportion to their shares as such former stockholders save and except, of course, that Charles A. Miller transferred his interest in the subject matter of this action as stated in the following paragraphs.

III.

That the said Charles A. Miller by assignment in

writing made since the commencement of this action conveyed to said Frederick L. Denman all right, title and interest of said Charles A. Miller to claims against the defendant for which recovery is sought in this action, a copy of which said assignment is [57] hereto annexed marked Exhibit "A" and made a part of this complaint.

IV.

That while acting as such trustee for the shareholders after said company had ceased to do business, the defendant without any consideration whatever, wrongfully and unlawfully appropriated to his own use from the capital return of said corporation, certain sums at the times and in the amounts stated as follows, to wit: In or about the month of January, 1919, the sum of $25,000.00; in or about the month of June, 1919, the sum of $25,000.00; and in or about the month of January, 1920, the sum of $2500.00, making a total of funds so misappropriated by the defendant, to his own use in the amount of $52,500.00. That the amount so taken was $5.25 for each share and included $4189.50 belonging to said Charles A. Miller on his 798 shares.

V.

That there is now, therefore, due and owing from the said Charles Richardson for money so had and received by him to the use of the plaintiff the sum of $4189.50, together with interest at the legal rate of six per cent per annum on said amount from and after the month of January, 1920. That before the commencement of this action plaintiff de-

manded payment of the sum of money above set forth from the defendant, who has paid no part of the same.

VI.

That the defendant has possession of and there is now in his custody in the office of his attorneys in this action all of plaintiff's certificates of stock together with the stock certificate book and the stock ledger of said corporation whereby the times and amounts when plaintiff became the owner of [58] his said shares of stock can be ascertained by the defendant and his attorneys readily and with certainty; that to the best of plaintiff's knowledge and belief the said Charles A. Miller has owned his said 798 shares since the month of April, 1917, until his conveyance thereof to the plaintiff F. L. Denman as above stated.

WHEREFORE plaintiff prays judgment against the defendant Charles Richardson in the sum of $6048.90, with interest at six per cent per annum on $1544.40 thereof from the 31st day of May, 1918, and on $4504.50 thereof from and after the 31st day of January, 1920, and for his costs and disbursements herein.

G. P. FISHBURNE,
A. H. DENMAN,
Attorneys for Plaintiff.

1518 Puget Sound Bank Building, Tacoma, Washington.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern

Division. Nov. 30, 1921. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [59]

Demurrer to Seventh Amended Complaint.

Comes now the defendant above named *a* demurring to the seventh amended complaint of the plaintiff, for cause of demurrer says:

I.

It demurs to the complaint setting forth the first cause of action upon the following grounds and for the following reasons:

1. That the Court has no jurisdiction of the person of the defendant or of the subject matter of the action.

2. That the plaintiff has no legal capacity to sue.

3. That there is a defect of parties plaintiff and that there is a defect of parties defendant.

4. That several causes of action have been improperly united.

5. That the complaint does not state facts sufficient to constitute a cause of action.

6. That the action has not been commenced within the time limited by law.

II.

As to the second cause of action, the defendant demurs to the complaint upon the following grounds and for the following reasons:

1. That the Court has no jurisdiction of the person of the defendant or of the subject matter of the action.

2. That the plaintiff has no legal capacity to sue.

3. That there is a defect of parties plaintiff, and that there is a defect of parties defendant.

4. That several causes of action have been improperly united. [60]

5. That the complaint does not state facts sufficient to constitute a cause of action.

6. That the action has not been commenced within the time limited by law.

III.

As to the third cause of action, the defendant demurs to the complaint upon the following grounds and for the following reasons:

1. That the Court has no jurisdiction of the person of the defendant or of the subject matter of the action.

2. That the plaintiff has no legal capacity to sue.

3. That there is a defect of parties plaintiff and that there is a defect of parties defendant.

4. That several causes of action have been improperly united.

5. That the complaint does not state facts sufficient to constitute a cause of action.

6. That the action has not been commenced within the time limited by law.

IV.

As to the fourth cause of action, the defendant demurs to the complaint upon the following grounds and for the following reasons:

1. That the Court has no jurisdiction of the person of the defendant or of the subject matter of the action.

2. That the plaintiff has no legal capacity to sue.

3. That there is a defect of parties plaintiff and that there is a defect of parties defendant.

4. That several causes of action have been improperly united.

5. That the complaint does not state facts sufficient [61] to constitute a cause of action.

6. That the action has not been commenced within the time limited by law.

KERR, McCORD & IVEY,
Attorneys for Defendant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Dec. 17, 1921. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [62]

Order Overruling Demurrer to Seventh Amended Complaint.

This cause came on for hearing January 16, 1922, upon the demurrer of the defendant to plaintiff's seventh amended complaint, and upon the written briefs of the parties thereafter delivered to the Court, plaintiff appeared by G. P. Fishburne and A. H. Denman, his attorneys, the defendant by E. S. McCord, one of his attorneys; and the Court upon due consideration overrules the demurrer, by memo decision filed Feb. 8, 1922—

It is therefore ORDERED AND ADJUDGED by the Court that the demurrer of the defendant to plaintiff's seventh amended complaint is insuffi-

cient in law and is hereby overruled and that the defendant have ten days in which to answer the said seventh amended complaint.

To that part of the foregoing order overruling the demurrer defendant excepts and his exception is by the Court allowed.

Dated this 23d day of March, 1922.

JEREMIAH NETERER,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Mar. 24, 1022. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [63]

Answer to Seventh Amended Complaint.

Comes now the defendant above named and answering the seventh amended complaint of the plaintiff, for cause of answer says:

Answering the first cause of action:

I.

Referring to the first paragraph of the first cause of action, the defendant admits that on and prior to June 1, 1919, the Pacific Cold Storage Company was a corporation organized under the laws of the State of Washington, with its principal place of business in the City of Tacoma, Pierce County, Washington; admits that a formal order of dissolution of the corporation was made and entered on the 2d day of June, 1919, in the Superior Court of the State of Washington for Pierce

County. Defendant denies each and every other allegation in said paragraph contained.

II.

Answering the second paragraph of the first cause of action, defendant admits that the capital stock of the Pacific Cold Storage Company was $1,000,000, that the same was divided into 10,000 shares of the par value of $100 each; admits that on the date of the dissolution of the corporation said F. L. Denman was the owner of 60 shares of the capital stock of said corporation, but denies each and every other allegation in said paragraph contained. [64]

III.

Answering the third paragraph of the first cause of action, the defendant admits that the corporation, during the period of its existence, from year to year declared dividends; admits that certain funds were available for distribution among the stockholders at the time of the entry of the order of dissolution; defendant specifically denies that any portion of the assets of the Pacific Cold Storage Company was unlawfully appropriated by the defendant and denies each and every other allegation in said paragraph contained.

IV.

Answering the fourth paragraph of the first cause of action, defendant admits that the defendant was a trustee and president of the Pacific Cold Storage Company, denies that the defendant wrongfully or unlawfully misappropriated or converted to his own use any of the funds of the corporation; defendant admits the payment of dividends in 1912

to 1918, and that the total dividends approximated the sum of $720,000; denies each and every other allegation in said paragraph contained.

V.

Answering the fifth paragraph of the first cause of action, defendant admits that he has refused to pay to the plaintiff the sum of $108.00, but denies each and every other allegation in said paragraph contained.

VI.

Answering the sixth paragraph of the first cause of action, defendant says that he has neither knowledge nor information sufficient to form a belief and therefore denies the same and each and every part thereof. [65]

Answering the second cause of action:

I.

Referring to the first paragraph of the second cause of action, the defendant admits that on and prior to June 1, 1919, the Pacific Cold Storage Company was a corporation organized under the laws of the State of Washington, with its principal place of business in the City of Tacoma, Pierce County, Washington; admits that a formal order of dissolution of the corporation was made and entered on the 2d of June, 1919, in the Superior Court of the State of Washington for Pierce County. Defendant denies each and every other allegation in said paragraph contained.

II.

Answering the second paragraph of the second cause of action, defendant admits that Charles A.

Miller, at the time of the dissolution of said corporation, was the owner of 798 shares of the capital stock of said corporation. Defendant denies each and every other allegation in said paragraph contained.

III.

Answering the third paragraph of the second cause of action, this defendant says that he has neither knowledge nor information as to the truth or falsity of the matters therein stated and therefore denies the same and each and every part thereof.

IV.

Answering the fourth paragraph of the second cause of action, the defendant admits that the corporation during the period of its existence, from year to year declared dividends; admits that certain funds were available for distribution among the stockholders at the time of the entry of the order of dissolution; defendant specifically denies that any portion of the assets of the Pacific Cold Storage Company was unlawfully appropriated by the defendant and denies each and every other allegation [66] in said paragraph contained.

V.

Answering the fifth paragraph of the second cause of action, defendant admits that the defendant was a trustee and president of the Pacific Cold Storage Company, denies that the defendant wrongfully or unlawfully misappropriated or converted to his own use any of the funds of the corporation; defendant admits the payment of dividends in 1912

to 1918, and that the total dividends approixmated the sum of $720,000; denies each and every other allegation in said paragraph contained.

VI.

Answering the sixth paragraph of the second cause of action, this defendant admits that he has failed to pay the sum of $1,436.40 mentioned in said paragraph, but denies each and every other allegation in said paragraph contained.

VII.

Answering the seventh paragraph of the second cause of action, defendant says he has neither knowledge nor information sufficient to form a belief and therefore denies the same and each and every part thereof.

Answering the third cause of action:

I.

Answering the first paragraph of the third cause of action, the defendant admits that on and prior to June 1, 1919, the Pacific Cold Storage Company was a corporation, organized under the laws of the State of Washington, with its principal place of business in the city of Tacoma, Pierce County, Washington; admits that a formal order of dissolution of the corporation was made and entered on the 2d day of J*uny,* 1919, in the Superior Court of the [67] State of Washington for Pierce County. Defendant denies each and every other allegation in said paragraph contained.

II.

Answering the second paragraph of the third cause of action, this defendant admits that the capi-

tal stock of the Pacific Cold Storage Company was the sum of $1,000,000 and that the plaintiff, Frederick L. Denman, was the owner of 60 shares of said stock at the time of dissolution, and denies each and every other allegation in said paragraph contained.

III.

Answering the third paragraph of the third cause of action, this defendant denies the same and each and every part thereof.

IV.

Answering the fourth paragraph of the third cause of action, this defendant admits that he has not paid the said sum of $315.00 mentioned in said paragraph; denies each and every other allegation in said paragraph contained.

V.

Answering the fifth paragraph of the third cause of action, this defendant says that he has neither knowledge nor information sufficient to form a belief as to the truth or falsity of the matters therein stated and therefore denies the same and each and every part thereof.

Answering the fourth cause of action:

I.

Answering the first paragraph of the fourth cause of action, this defendant admits that on and prior to June 1, 1919, the Pacific Cold Storage Company was a corporation organized under the laws of the State of Washington, with its principal place of [68] business in the City of Tacoma, Pierce County, Washington; admits that a formal order

of dissolution of the corporation was made and entered on the 2d day of June, 1919, in the Superior Court of the State of Washington for Pierce County. Defendant denies each and every other allegation in said paragraph contained.

II.

Answering the second paragraph of the fourth cause of action, this defendant admits that the capital stock of the Pacific Cold Storage Company at the time of its dissolution was $1,000,000 and that at the time of the dissolution Chas. A. Miller owned 798 shares of said stock. As to the remaining allegations of the paragraph, this defendant says that he has neither knowledge nor information sufficient to form a belief and therefore denies the same and each and every part thereof.

III.

Answering the third paragraph of the fourth cause of action, this defendant says that he has neither knowledge or information to form a belief as to the truth or falsity of the matters therein stated and therefore denies the same and each and every part thereof.

IV.

Answering the fourth paragraph of the fourth cause of action, this defendant denies the same and each and every part thereof.

V.

Answering the fifth paragraph of the fourth cause of action, this defendant admits that he has not paid the sum of $4,198.50 mentioned therein;

denies each and every other allegation in said paragraph contained. [69]

VI.

Answering the sixth paragraph of the fourth cause of action, defendant says that he has neither knowledge nor information sufficient to form a belief and therefore denies the same and each and every part thereof.

For a further and first affirmative defense to the seventh amended complaint of the plaintiff, this defendant alleges:

I.

That the Pacific Cold Storage Company is a corporation organized under the laws of the State of Washington with its principal place of business in the City of Tacoma, Pierce County, Washington; that said corporation was organized on or about the 8th of April, 1897, with a capital stock of $150,000; that subsequently the capital stock of said corporation was increased to $500,000 and later increased to $1,000,000, consisting of 10,000 shares of the par value of $100 each; that at the time of the first and second increase of the capital stock of the corporation, a large percentage of the capital stock of said corporation was acquired, held and owned by residents of Glasgow, Scotland, and other places in Great Britain; that more than 90 per cent of the capital stock of said corporation was owned and held by residents of Great Britain long prior to June 1, 1911, and down to the date of the dissolution of the corporation.

II.

That by reason of the fact that such a large percentage of the capital stock of the corporation was held in Great Britain an advisory committee was appointed by the stockholders residing in Great Britain with the consent and approval of the defendant and of all of the stockholders of said corporation residing in the United States; that the creation of said committee was the joint action of all of the stockholders of the corporation; that said advisory committee was appointed at the time of the first increase of the capital stock of the corporation and continued to [70] be appointed and maintained down to the date of the dissolution of the corporation as hereinafter stated; that each appointment of the advisory committee by the stockholders in Great Britain was ratified and approved by the stockholders residing in the United States and that the creation, maintenance and continuance of said advisory committee was the result of the unanimous action of all of the stockholders of the corporation; that all important business affecting the affairs of the corporation and its policies was submitted to the advisory committee for its approval; that said advisory committee, by the consent of each and all of the stockholders of the corporation, was clothed with powers to enable it to control and regulate and dictate the policies of the corporation, subject only to the approval of the board of trustees of the corporation; that it was agreed by each and all of the stockholders of the corporation that such advisory committee should

have the same powers with regard to the control of the management of the affairs of the corporation as a board of trustees or directors would ordinarily possess and exercise; that full and complete statements and reports of all of the important business of the corporation was submitted to such advisory committee for its approval before action was taken thereon and that the officers of the company complied with the requests of such advisory committee in the conduct and management of the affairs of the corporation at all times; that Mr. David Inglis was the secretary of said advisory committee from the date of its creation to the date of the dissolution of the corporation, and that all statements, audits and reports were sent to the advisory board in care of said David Inglis.

III.

That from about the year 1901 until the date of the dissolution of the corporation, on or about the 3d of June, 1919, the defendant, Charles Richardson, was the president and a member [71] of the board of trustees of said corporation and had active charge and management as such president, of the affairs of said corporation, performing the duties prescribed by the by-laws of the corporation; that for several years prior to January 1, 1911, the said defendant, as such president, drew a salary of $1,000 per month; that on or about the 14th day of December, 1910, the defendant communicated with the advisory committee and indicated that he was not satisfied with the salary that he had been draw-

ing as such president and requested some additional compensation; that on the 13th of January, 1911, the said advisory committee in answer to the defendant's letter of December 14, 1910, wrote the defendant as follows:

> "As regards your own remuneration—Since you raised the point a short time ago, the Board have had the matter before them, and it was their intention that they would shortly have made you a proposal that you be allowed by way of increased *a*molument, an annual commission or bonus on the total amount of dividend paid to the shareholders in each year. Such bonus, they propose should be at the rate of 2½% beginning with the current year."
>
> "They trust that you will view these proposals as a favorable settlement."

That the defendant accepted such proposal and agreed to accept by way of additional compensation for his services a sum from the corporation equal to 2½ per cent upon the amount of the annual dividends paid by the corporation to its shareholders; that the arrangements thus made between the advisory board and the defendant was communicated by the defendant to the board of trustees of the corporation and was in all things approved by the trustees of the corporation then in office; that such arrangement for additional compensation in the amount above stated was thereafter with the consent and approval of the board of trustees of the company, continued until January, 1918, covering the intervening years from January

1, 1911, to December 31, 1917, inclusive, and that said additional sum equal to 2½ per cent of the amount of the dividends declared and paid to the shareholders was paid to [72] the defendant on or about the first of January of each year of said period.

IV.

That all dividends declared by the corporation were paid by the corporation to the shareholders in the amounts of the dividends so declared; that no portion of said 2½ per cent was deducted from the dividends declared to the shareholders, that the shareholders received the full amount of the dividends annually declared during said period but that said 2½ per cent additional emolument or compensation to defendant's salary was paid by the corporation and that the amounts so paid were measured by the computation of 2½ per cent upon the annual dividends declared and paid to the shareholders; and that such payment of 2½ per cent was ratified and approved by the action of the board of trustees of the corporation and by the stockholders of said corporation; that the authorization of the payment of said additional compensation of 2½ per cent was authorized by the board of trustees, by the advisory committee and by the stockholders prior to the several dates upon which the same were paid to the defendant as such additional compensation for his services as president of the corporation.

V.

That at the time such arrangement for such addi-

tional compensation of 2½ per cent was made, and continuously thereafter until about the first of June, 1918, the plaintiff Frederick L. Denman was the secretary and auditor of the corporation and that it was his duty as such auditor and secretary to keep the record and account books of the corporation and to make up vouchers explanatory of all disbursements; that from year to year as such additional compensation was paid by the corporation to the defendant, the said plaintiff, Frederick L. Denman, made up such vouchers; that the explanation upon the vouchers for such additional compensation [73] was substantially as follows:

> "Extra on 2½ per cent of *toal* dividend as per order on file."

together with the amount so paid to the defendant; that the order on file referred to in vouchers by the said plaintiff, Frederick L. Denman, was the agreement or order of the said advisory committee; that each year the account books of the corporation were audited and a report of such audit made and in such audits so annually made the 2½ per cent additional compensation was included and explained; that such audits were submitted to the advisory board and to the stockholders represented by the advisory board and were approved by them, and that such audits were submitted to the board of trustees annually and to the stockholders' meetings in the City of Tacoma and were approved by the board of trustees and by the stockholders' and that the checks drawn by the corporation in payment of said additional compensation were signed by the said

plaintiff, Frederick L. Denman; that the payment of such additional compensation was authorized by the board of trustees of the corporation and by the stockholders and subsequently ratified by the board of trustees and by the stockholders and continued from the time the arrangement was put into effect in 1911 down to and including the year 1917 without the objection or protest or criticism of any stockholder or officer and during a considerable portion of the period the said Frederick L. Denman was one of the trustees of the said corporation.

VI.

That about two years prior to the 31st of May, 1918, the defendant *was* submitted to the advisory board a suggestion of liquidating the corporation and at such time suggested that if it were finally decided to liquidate the corporation, defendant thought that he should be paid a commission upon the amount of money realized from the sale of the assets and their conversion [74] into money and further indicated to said advisory board that he considered five per cent upon the amount so realized as a reasonable and just compensation; that the advisory board authorized and approved the payment of said commission of 5 per cent and that said agreement so made between the advisory board and defendant was thereafter ratified and approved by the board of trustees of the corporation and by the stockholders thereof; that at a meeting of the stockholders of the corporation held on the 31st of May, 1918, the following resolution was unanimously adopted:

"WHEREAS, it is desired by the stockholders that the company should be liquidated and all of its assets sold and that a return of the capital be made as speedily as possible.

"THEREFORE BE IT RESOLVED that the officers of this company are directed to sell and dispose of all of the assets of the company as rapidly as possible and wind up its affairs, returning to the shareholders the amount realized therefor."

That said corporation was not, however, dissolved until the 1st of June, 1919, when an order was duly entered in the Superior Court of Pierce County, Washington, dissolving and disincorporating said company. That on or about the 31st of May, 1918, the defendant submitted to the advisory board a proposal to convert the assets of the company into money and to devote his time to the liquidation of the affairs of the corporation for a commission of 5 per cent on the amount returned to the shareholders; that later, and on July 12, 1918, the defendant again submitted a written proposal to the advisory board, in which he stated that he would devote his time to the liquidation of the company for a commission of 5 per cent on the amount returned to the shareholders, his salary to cease on September 30, 1918; that out of this commission he would pay all commissions and attorneys' fees that he found necessary to be paid in winding up the company, excepting amounts paid in connection with the sale of the "Elihu Thompson," a vessel belonging to the corporation, and that he [75]

would retain the services of R. J. Davis and B. A. Moore for as short a time as possible, who should be paid their present salaries by the corporation. He further stated to the advisory board that it was not his intention to engage in any other business until the company's affairs had been wound up and complete returns made to the shareholders; that this would preclude him from earning anything else during such time; that he hoped to liquidate the company within a year but that contingencies might arise that would require his services for a longer period; that while it should be optional with him, he expected to pay out of his commission of 5 per cent any other officers of the corporation who might be of assistance to him in closing its affairs; that on the 18th of August, 1918, the advisory board agreed to said proposal for remuneration as stated in defendant's letter of July 12th and later and on the 21st of August, 1918, said proposal was further accepted by letter from the advisory board; that immediately upon the receipt of said cablegram or wire from the advisory board the proposed arrangement by which the defendant should receive a commission of five per cent upon the amounts returned to the stockholders was submitted to the board of trustees of the corporation and the same was approved by them and accepted by the defendant and the agreement consummated; that later, and on the 7th of January, 1919, the arrangement for the payment of said commission of 5 per cent to the defendant was again brought before the board of trustees at a meeting of such

board held on said date, and a resolution was duly adopted by the unanimous vote of the board of trustees with the exception of the defendant, who did not vote thereon, said resolution being as follows:

> "WHEREAS, it appears from correspondence between Charles Richardson and the Advisory Board of Glasgow, as shown in a letter from Mr. Richardson of July 12, 1918, and cable in reply of August 18, 1918, and letter of confirmation of August 21, 1918, that an agreement as to compensation to Mr. Richardson for his services in winding up the company and disposing of the assets has been reached so far as it affects a large majority of the shares of the company, and [76]
>
> "WHEREAS, it appears that said agreement is fair and just and that such compensation is reasonable,
>
> "THEREFORE BE IT RESOLVED that the offer contained in the letter of Mr. Richardson of July 12, 1918, be, and the same is hereby accepted and the agreement as set forth in the correspondence between Mr. Richardson and the Advisory Board as herein referred to be, and the same is hereby confirmed and ratified and the officers of this company are authorized and directed to pay the compensation therein named and to fully carry out all of the terms of said agreement."

That the proceedings taken at said meeting of the board of trustees of the corporation held on

January 7, 1919, are hereto attached, marked Exhibit "A," and made a part hereof. That the foregoing resolution was offered at said meeting by Mr. Harold Seddon, who moved its adoption, which was seconded by Mr. Charles A. Miller, the owner at that time of 798 shares of the capital stock of the company, being the same Charles A. Miller named in paragraph II of the second and fourth causes of action.

VII.

That prior to September 1, 1918, the defendant sold and disposed of a portion of the assets of the corporation and shortly after the first of September, 1918, the corporation declared a dividend by the way of distribution of the capital assets of the sum of $500,000.00 and the same was paid by the corporation to its stockholders and later and on or before June 1, 1919, the defendant converted other and additional assets of the corporation into money in the sum of $500,000.00 and the same was distributed by way of a dividend in the distribution of the capital assets of the corporation on or about the 3d of June, 1919, and the same was received by the shareholders and a further dividend was declared and paid in the sum of $50,000.00, making a total distribution of the capital assets to the stockholders in the sum of $1,050,000.00; that said agreement for the payment of said commission of 5 per cent was approved by the advisory board and approved by the board of trustees of the corporation prior to [77] its payment and was subsequently ratified by the action of the share-

holders; that the payment of said commission was authorized by the board of trustees; that the large returns to the stockholders was due to the efforts of the defendant in making advantageous sales and disposition of the assets; that if the said defendant had not sold said assets at the time they were sold, the returns to the stockholders would have been less by the sum of several hundred thousand dollars; that the defendant procured the most advantageous and favorable sales of said assets, that the defendant ceased drawing his salary of $1,000.00 per month on the 30th of September, 1918, in accordance with his said agreement; that at the time said agreement was made for the commission of five per cent the defendant did not know and could not know whether his time would be consumed for a period of one year or two or three years; that it might have taken even a longer time than three years had not the defendant been particularly zealous and successful in the prompt sale and disposition of said assets.

That on the 31st day of May, 1919, the following named persons at a meeting of the stockholders of the corporation were elected trustees, to wit: Charles Richardson, Harold Seddon, B. A. Moore, E. J. Walsh, Ralph S. Stacy, H. C. Schweinler, R. J. Davis, who duly qualified by taking the usual oath of office and entered upon the performance of their duties as trustees; that on the first day of June, 1919, said corporation was dissolved by an order of the Superior Court of Pierce County, Washington, as aforesaid; that the above-named persons were duly elected, qualified and acting trus-

tees of said corporation at the time of its dissolution, and thereupon became the trustees of the creditors and stockholders of the corporation with full power and authority to sue and recover the debts and property of the corporation by the name of the trustees of said corporation, with authority to collect and pay the outstanding debts, settle all of the affairs of the corporation and divide [78] among the stockholders the money and other property that remained after the payment of the debts and necessary expenses; that in their capacity as such trustees under the provisions of Section 3707 of Remington's Code of the State of Washington, said trustees became possessed of the money theretofore in the treasury of the corporation and the said trustees distributed the same by way of dividends and return of the capital stock to the shareholders, which distribution was made on or about June 3, 1919. That since said date all of the affairs of the corporation have been managed and controlled by said board of trustees hereinbefore named and not by this defendant except in so far as he was a member of said board of trustees.

VIII.

That the said defendant at no time ever owned or controlled more than 1353 shares of the capital stock of said corporation; that all sums paid to this defendant were authorized previous to such payments by the board of trustees and by the stockholders and were subsequently ratified and approved by the stockholders, and that as to the 798 shares formerly owned by Charles A. Miller, the said Charles A.

Miller voted affirmatively in favor of a resolution of the board of trustees authorizing the payment of the same as a fair and just compensation for the services to be rendered and that the said Frederick L. Denman acquired said 798 shares with full knowledge of the fact that the said Charles A. Miller had affirmatively approved the payment of said commissions to this defendant, and that the said Frederick L. Denman, himself, and as the successor of the stockholders named in amended complaint, likewise ratified and approved the action of the board of trustees in the payment of the 2½ per cent commission hereinbefore referred to. [79]

SECOND AFFIRMATIVE DEFENSE.

For a further and second affirmative defense to the third and fourth causes of action set forth in the seventh amended complaint, defendant alleges:

I.

That the services performed by this defendant in winding up the affairs of the corporation and in selling and disposing of its assets and in the conversion of the same into money and the distribution of the same to the stockholders, were services rendered outside the scope of his official duties as president and trustee of the corporation; that the reasonable and fair value of the services rendered to the corporation by this defendant outside the scope of his official duties as president and trustee was the sum paid by the corporation for such services; that even though there was no express contract between the corporation, its trustees and stockholders for the payment of said services, the

defendant is entitled to the sums paid for the reason that they were reasonably fair and just for the services rendered outside the scope of the official duties of the defendant as provided by the by-laws of the corporation, and that an implied contract was created for such services even though the Court should hold that there was no express contract for the payment of the amount received by the defendant in the winding up of the corporation, the conversion of its property into money and the distribution of the same among the stockholders.

THIRD AFFIRMATIVE DEFENSE.

For a further and third affirmative defense to the seventh amended complaint, defendant alleges:

I.

That by reason of the actions of the said Frederick L. Denman and Charles A. Miller and by reason of the acts and things done and performed by them as set forth in the first affirmative [80] defense, to which reference is hereby made and the same is hereby made a part of this third affirmative defense, the said plaintiff is estopped from claiming a return of said commissions, or any part thereof from this defendant; that as to the $1,436.40 claimed by the plaintiff in the second cause of action, the payments were made in January 1912, 1913, 1914, 1915, 1916, 1917 and 1918; that this action was not commenced until more than three years after January, 1918, to wit, on November 21, 1921, as to the second cause of action, and that the liability of the defendant, if any, accrued more than three years

before the commencement of the second cause of action and is barred by the statute of limitations.

FOURTH AFFIRMATIVE DEFENSE.

For a further and fourth affirmative defense to the seventh amended complaint, this defendant alleges:

I.

That as to the first cause of action, the payments were made in the months of January, 1912, down to and including January, 1918, and that all of the amounts claimed by the plaintiff in the first cause of action accrued, if at all, more than three years prior to the date of the commencement of this action except as to the payments in January, 1917, and 1918, and that the same are barred by the statute of limitations.

FIFTH AFFIRMATIVE DEFENSE.

For a further and fifth affirmative defense to the seventh amended complaint, this defendant alleges:

I.

That at the time of the commencement of this action, the said Charles A. Miller was the owner of 798 shares of the capital stock of the Pacific Cold Storage Company; that no claim of the said Charles A. Miller accrued while he was the owner and holder of said 798 shares of stock; that no assignee of the claim [81] of Charles A. Miller so accruing can be maintained in the courts of the United States under Equity Rule 94, or at all, either in law or in equity.

WHEREFORE having fully answered, the defendant prays that he be dismissed hence with his costs and disbursements in this action expended.

KERR, McCORD & IVEY,
Attorneys for Defendant. [82]

Exhibit "A"

Glasgow, Aug. 21, 1918.

Charles Richardson, Esq.
Tacoma, Wash. U. S. A.

Dear Sir:

I have to acknowledge receipt of your letters of the 12th and 16th ult. As you request in the letter a cable reply on the subject of remuneration, I at once cabled you as follows: "Charich, Tacoma: Advisory Board agree proposal for remuneration as stated your letter twelfth July. "Inglis," which I now confirm. The Advisory Board trust that the arrangement will work out to mutual satisfaction. Your letter of 16th ult. was only received by me on the 17th curt.

Yours faithfully,
DAVID INGLIS.

After a general discussion Mr. Harold Seddon offered the following resolution and moved its adoption, which was seconded by Mr. Miller, viz:

"RESOLUTION.

WHEREAS, It appears from correspondence between Mr. Charles Richardson and the Advisory Board at Glasgow, as shown in a letter from Mr. Richardson of July 12, 1918, and cable in reply

of August 18, 1918, and letter of confirmation of August 21, 1918, that an agreement as to compensation to Mr. Richardson for his services in winding up the Company and disposing of the asssets has been reached so far as it effects a large majority of the shares of the Company; and

WHEREAS, It appears that said agreement is fair and just, and that such compensation is reasonable; Therefore,

BE IT RESOLVED, That the offer contained in the letter of Mr. Richardson of July 12, 1918, be and the same is hereby accepted, and the agreement as set forth in the correspondence between Mr. Richardson and the Advisory Board, as herein referred to, be and the same is hereby confirmed and ratified, and the officers of this Company are authorized and directed to pay the compensation therein named, and to fully carry out all of the terms of said agreement.

The question of the adoption of the resolution being put to a vote, Messrs. Stacy, Miller, Davis, Seddon and Moore voted in favor thereof, Mr. Richardson not voting. The Chairman then announced that the said resolution had been adopted.

Mr. Seddon then moved that the thanks of the Trustees be expressed to the officers of the Company for the efficient and able manner in which the affairs of the Company had been managed. This motion was seconded by Mr. Miller and was declared carried by the Chairman.

Mr. Richardson called the attention of the Board of a letter regarding his compensation from Mr.

David Inglis, Secretary of the Advisory Board, dated July 2, 1918. He stated that he had left the matter open so that it might be considered by a full Board. Mr. Richardson stated that Mr. Inglis had been of great assistance to him in dealing with the question of the dissolution of the Company [83] and that his advice had been valuable to the Company. That a great deal more work had been done by him than was usual in the performance of his duties, and hoped the Board would consider favorably Mr. Inglis' suggestion concerning his compensation. After full discussion, Mr. Harold Seddon moved that the Company pay Mr. Inglis the equivalent of two hundred pounds instead of one hundred and fifty pounds, as had been paid him heretofore. That this decision be communicated to Mr. Inglis with the hope that it would be satisfactory; and if not that the Board here hoped the Advisory Board would intimate its desires in the matter, which would have our further careful consideration.

This motion was seconded by Mr. Davis and was adopted by a vote of all the Trustees.

There being no further business, the meeting adjourned.

"RALPH S. STACY,"
Chairman.

"B. A. MOORE,"
Secy.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern

Division. May 1, 1922. F. M. Harshberger, Clerk. By Alice Huggins, Deputy. [84]

Motion for Order to Make More Definite and Certain and Strike Portions of Answer to Seventh Amended Complaint.

Comes now the plaintiff and moves the Court for an order to strike from the answer of defendant to plaintiff's seventh amended complaint the third affirmative defense commencing on line 30 on page 17 and ending on line 18 of page 18 of said answer, and also the fifth affirmative defense on pages 18 and 19 of said answer, on the ground that said third affirmative defense is on its face sham and frivolous, and said fifth affirmative defense is sham, frivolous, irrelevant and redundant.

Plaintiff further moves the Court for an order requiring the defendant to make said answer more definite and certain in following mentioned particulars, to wit:

Page 7, lines 23, 26 and 27. By stating whether such advisory committee was created and appointed by any writing or resolution of the stockholders or trustees or by-laws of said corporation and if so to set forth the substance or a copy of said writing, resolution or by-laws.

Page 7, lines 23, 26 and 27. By stating whether the creation and appointment of said advisory committee is recorded in the minutes of any meeting of the trustees or stockholders of said corporation

and if so to set forth the substance or a copy of said minutes and the date thereof.

Pages 7 and 8 in general and particularly lines 9 to 12, inclusive, thereof. By stating whether the powers claimed for said advisory committee and the alleged consent of the stockholders thereto are expressed in writing or in the records of any stockholders' or trustees' meetings or by-laws of said corporation and if so to set forth the substance or a copy of said writing, records and by-laws.

Page 9, lines 21 to 31. By stating whether the alleged [85] communication to the Board of Trustees concerning additional compensation of defendant, was made in writing and whether the alleged approval of the trustees appears by the record of any trustees' meeting; also by stating the substance and date of such approval, if any.

Page 10, paragraph IV, lines 12 to 20, and page 11, lines 13 to 24. By stating whether the alleged authorization and approval and ratification by the trustees and stockholders of the payment of said additional compensation to defendant was expressed in writing or appears by the record of any trustees or stockholders' meeting; also by setting forth the substance and date of any such writing or record.

Page 11, lines 7 to 14. By stating particularly whether the reports of audits alleged to have been made to trustees and stockholders were in writing, by whom each such report was made and what mention if any was made in such reports concerning the extra compensation of two and one-half

per cent paid to defendant or claimed by him; also the substance of any matter contained in such reports calling attention to the fact that defendant received or claimed said additional compensation; and whether said approval of the trustees and stockholders was in writing or appears in the minutes of any meeting of said trustees or stockholders and if so to set forth copies thereof.

Page 12, lines 5 and 6. By stating whether such ratification and approval by the board of trustees and stockholders were in writing or shown in the minutes of the meetings of the trustees or stockholders and if so to set forth the substance or copies thereof; and also give the date of said ratification and approval.

Page 13, lines 17 to 20, inclusive. By stating when such [86] proposed arrangement was submitted to the board of trustees and whether same was approved by them in writing and whether such approval is shown by the minutes of the board and the date of such approval, and if in writing or occurring in the minutes of the corporation to set forth copies thereof.

Page 14, paragraph VII. By stating what part of the capital assets distributed to the stockholders of the Pacific Cold Storage Company and on which he collected his said commission of five per cent were funds accumulated by said company prior to its dissolution and when said company was a going concern.

Page 15, first line (unnumbered). By stating whether the alleged ratification by stockholders of

payment of said five per cent commission was in writing and whether such alleged ratification by stockholders appears by the records of any meeting of stockholders of said corporation and if so the substance and date of any such record or writing.

Page 15, line 2. By stating whether the authorization to pay said commission was written or occurs in the minutes and if so to set it forth and give the date.

Page 16, line 16. By stating when such authorizations were given and whether in writing or occurring in the minutes and if so setting forth substance or copies thereof together with dates.

G. P. FISHBURNE and
A. H. DENMAN,
Attorneys for Plaintiff.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. April 11, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [87]

Order on Motion to Make More Definite and Certain and Strike Portions of Answer to Seventh Amended Complaint.

This cause coming on for hearing on the motion of the plaintiff to strike and to make more definite and certain portions of the answer of the defendant to the seventh amended complaint herein and the Court having heard the arguments of counsel,—

WHEREFORE IT IS ORDERED that the motion to strike the third affirmative defense and the fifth affirmative defense be and is hereby de-

nied, to which the plaintiff excepts and his exceptions are allowed.

IT IS FURTHER ORDERED that the defendant make page 7, lines 23, 26 and 27, more definite and certain by stating whether said advisory committee was created by any writing or resolution of the stockholders or trustees or by-laws of said corporation, and if so, the date of said writing, resolution or by-laws and the place where they may be found among the papers and books of the Pacific Cold Storage Company, to which the defendant excepts and his exceptions are allowed.

IT IS FURTHER ORDERED that if the creation and appointment of said advisory committee referred to on page 7, lines 23, 26 and 27, is recorded in the minutes of any meeting of trustees or stockholders of said corporation, that defendant give the date thereof and the place where they will be found in the corporation records, to which the defendant excepts and his exceptions are allowed.

IT IS FURTHER ORDERED that pages 7 and 8, particularly lines 9 to 12 and 12 to 16, on page 8, inclusive, be made more definite and certain by stating whether the powers claimed for said advisory committee and the consent of the stockholders thereto are expressed in writing or in the records of any stockholders' or trustees' meetings or by-laws of said corporation, and if in writing the defendant be required to furnish plaintiff a copy of same, and if in [88] the records of any stockholders' or trustees' meetings that he be re-

quired to give the date of same and the volume and page of the books wherein they will be found, to which the defendant excepts and his exceptions are allowed.

IT IS FURTHER ORDERED that page 9, lines 21 to 31, inclusive, be made more definite and certain by the defendant stating whether the communication of the board of trustees concerning additional compensation of defendant was made in writing and if so by furnishing plaintiff a copy of same and whether the approval of the trustees appears by the record of any trustees' meeting, and if so by giving the date of such approval and the volume and page in the book or books of the Pacific Cold Storage Company where it may be found, to which the defendant excepts and his exceptions are allowed.

IT IS FURTHER ORDERED that page 10, paragraph 4, lines 12 to 20, and page 11, lines 13 to 24, be made more definite and certain by the defendant stating whether the alleged authorization and approval and ratification by the trustees and stockholders of the payment of said additional compensation to defendant was expressed in writing and if so by furnishing plaintiff with a copy of same, and by stating whether said authorization appears by the record of any trustees' or stockholders' meeting and by giving the dates of same and where they may be found in the books of the Pacific Cold Storage Company by volume and page, to which the defendant excepts and his exceptions are allowed.

IT IS FURTHER ORDERED that the defendant make page 11, lines 7 to 14, more definite and certain by stating whether the reports of audits were made to trustees and stockholders are in writing and by whom such report was made and how the two and one-half per cent item paid to defendant was described in said audit and whether the [89] approval of the trustees and stockholders of the two and one-half per cent paid defendant was in writing or appears in the minutes of any meeting of said trustees or stockholders and if in writing by setting forth copy thereof, and if in the minutes of any meeting of the trustees or stockholders by giving the date of same and the volume and page of the books of the Pacific Cold Storage Company in which it occurs, to which the defendant excepts and his exceptions are allowed.

IT IS FURTHER ORDERED that page 12, lines 5 and 6, be made more definite by stating whether the ratification and approval by the board of trustees and stockholders were in writing or shown in the minutes of the meeting of the trustees or stockholders, and if in writing by giving plaintiff a copy of same, and if in the minutes by giving the date of same and place where they will be found in the records of the Pacific Cold Storage Company, and also by giving the date of said ratification and approval, to which the defendant excepts and his exceptions are allowed.

IT IS FURTHER ORDERED that page 13, lines 17 to 20, inclusive, be made more definite by stating when the proposed arrangement was submit-

ted to the board of trustees and whether the same was approved by them in writing and whether such approval is shown in the minutes of the board and the date of such approval, and if in writing by furnishing plaintiff with a copy of same, and if occurring in the minutes of the corporation by giving the date of same and where they will be found in the corporation records and books, to which the defendant excepts and his exceptions are allowed.

IT IS FURTHER ORDERED that the motion to make page 14, paragraph 7, more definite and certain as requested in the middle of page 2 of said motion be and is hereby denied, to which the [90] plaintiff excepts and his exceptions are allowed.

IT IS FURTHER ORDERED that the first unnumbered line on page 15 be made more definite by stating whether the alleged ratification by stockholders of payment of said five per cent commission was in writing and whether same appears by the records of any meeting of stockholders of said corporation, and if in writing by giving plaintiff copy of same, and if it appears in the records of said corporation the date and place where same may be found in said records, to which the defendant excepts and his exceptions are allowed.

IT IS FURTHER ORDERED that page 15, line 2, be made more definite and certain by stating whether the authorization to pay said commission was written or occurs in the minutes, and if in writing by furnishing the plaintiff a copy of same,

and if in the minutes by giving the date and place where same may be found in the records of said corporation, to which the defendant excepts and his exceptions are allowed.

IT IS FURTHER ORDERED that page 16, line 16, be made more definite and certain by stating when such authorizations were given, whether in writing or occurring in the minutes, and if in writing by furnishing plaintiff a copy of same, and if in the minutes by giving the dates and where same will be found in the records, to which the defendant excepts and his exceptions are allowed.

Done in open court this 8th day of May, 1922.

JEREMIAH NETERER,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. May 9, 1922. F. M. Harshberger, Clerk. By Alice Huggins, Deputy. [91]

Amended Answer to Seventh Amended Complaint.

Comes now the defendant above named and for an amended answer to the seventh amended complaint of the plaintiff admits, denies and alleges as follows, to wit:

Answer the first cause of action:

I.

Referring to the first paragraph of the first cause of action, the defendant admits that on and prior to June 1, 1919, the Pacific Cold Storage Company

was a corporation organized under the laws of the State of Washington, with its principal place of business in the City of Tacoma, Pierce County, Washington; admits that a formal order of dissolution of the corporation was made and entered on the 2d of June, 1919, in the Superior Court of the State of Washington for Pierce County. Defendant denies each and every other allegation in said paragraph contained.

II.

Answering the second paragraph of the first cause of action, defendant admits that the capital stock of the Pacific Cold Storage Company was $1,000,000, that the same was divided into 10,000 shares of the par value of $100 each; admits that on the date of the dissolution of the corporation said F. L. Denman was the owner of 60 shares of the capital stock of said corporation, but denies each and every other allegation in said [92] paragraph contained.

III.

Answering the third paragraph of the first cause of action, the defendant admits that the corporation, during the period of its existence, from year to year declared dividends; admits that certain funds were available for distribution among the stockholders at the time of the entry of the order of dissolution; defendant specifically denies that any portion of the assets of the Pacific Cold Storage Company was unlawfully appropriated by the defendant and denies each and every other allegation in said paragraph contained.

IV.

Answering the fourth paragraph of the first cause of action, defendant admits that the defendant was a trustee and president of the Pacific Cold Storage Company, denies that the defendant wrongfully or unlawfully misappropriated or converted to his own use any of the funds of the corporation; defendant admits the payment of dividends in 1912 and 1918, and that the total dividends approximated the sum of $720,000; denies each and every other allegation in said paragraph contained.

V.

Answering the fifth paragraph of the first cause of action, defendant admits that he has refused to pay to the plaintiff the sum of $108.00, but denies each and every other allegation in said paragraph contained.

VI.

Answering the sixth paragraph of the first cause of action, defendant says that he has neither knowledge nor information sufficient to form a belief and therefore denies the same and each and every part thereof. [93]

Answering the second cause of action:

I.

Referring to the first paragraph of the second cause of action, the defendant admits that on and prior to June 1, 1919, the Pacific Cold Storage Company was a corporation organized under the laws of the State of Washington, with its principal place of business in the City of Tacoma, Pierce County, Washington; admits that a formal order of dis-

solution of the corporation was made and entered on the 2d of June, 1919, in the Superior Court of the State of Washington for Pierce County. Defendant denies each and every other allegation in said paragraph contained.

II.

Answering the second paragraph of the second cause of action, defendant admits that Charles A. Miller at the time of the dissolution of said corporation was the owner of 798 shares of the capital stock of said corporation. Defendant denies each and every other allegation in said paragraph contained.

III.

Answering the third paragraph of the second cause of action, this defendant says that he has neither knowledge nor information as to the truth or falsity of the matters therein stated and therefore denies the same and each and every part thereof.

IV.

Answering the fourth paragraph of the second cause of action, the defendant admits that the corporation, during the period of its existence, from year to year declared dividends; admits that certain funds were available for distribution among the stockholders at the time of the entry of the order of dissolution; defendant specifically denies that any portion of the [94] assets of the Pacific Cold Storage Company was unlawfully appropriated by the defendant and denies each and every other allegation in said paragraph contained.

V.

Answering the fifth paragraph of the second cause of action, defendant admits that the defendant was a trustee and president of the Pacific Cold Storage Company; denies that the defendant wrongfully or unlawfully misappropriated or converted to his own use any of the funds of the corporation; defendant admits the payment of dividends in 1912 to 1918, and that the total dividends approximated the sum of $720,000; denies each and every other allegation in said paragraph contained.

VI.

Answering the sixth paragraph of the second cause of action, this defendant admits that he has failed to pay the sum of $1436.40 mentioned in said paragraph, but denies each and every other allegation in said paragraph contained.

VII.

Answering the seventh paragraph of the second cause of action, defendant says that he has neither knowledge nor information sufficient to form a belief and therefore denies the same and each and part thereof.

Answering the third cause of action.

I.

Answering the first paragraph of the third cause of action, the defendant admits that on and prior to June 1, 1919, the Pacific Cold Storage Company was a corporation organized under the laws of the State of Washington, with its principal place of business in the City of Tacoma, Pierce County, Washington; [95] admits that a formal order of

dissolution of the corporation was made and entered on the 2d day of June, 1919, in the Superior Court of the State of Washington for Pierce County Defendant denies each and every other allgation in said paragraph contained.

II.

Answering the second paragraph of the third cause of action, this defendant admits that the capital stock of the Pacific Cold Storage Company was the sum of $1,000,000 and that the plaintiff, Frederick L. Denman, was the owner of 60 shares of said stock at the time of dissolution, and denies each and every other allegation in said paragraph contained.

III.

Answering the third paragraph of the third cause of action, the defendant denies the same and each and every part thereof.

IV.

Answering the fourth paragraph of the third cause of action, this defendant admits that he has not paid the said sum of $315.00 mentioned in said paragraph; denies each and every other allegation in said paragraph contained.

V.

Answering the fifth paragraph of the third cause of action, this defendant says that he has neither knowledge nor information sufficient to form a belief as to the truth or falsity of the matters therein stated and therefore denies the same and each and every part thereof.

Answering the fourth cause of action:

I.

Answering the first paragraph of the fourth cause of [96] action, this defendant admits that on and prior to June 1, 1919, the Pacific Cold Storage Company was a corporation organized under the laws of the State of Washington, with its principal place of business in the City of Tacoma, Pierce County, Washington; admits that a formal order of dissolution of the corporation was made and entered on the 2d of June, 1919, in the Superior Court of the State of Washington for Pierce County. Defendant denies each and every other allegation in said paragraph contained.

II.

Answering the second paragraph of the fourth cause of action, this defendant admits that the capital stock of the Pacific Cold Storage Company at the time of its dissolution was $1,000,000 and that at the time of its dissolution Chas. A. Miller owned 798 shares of said stock. As to the remaining allegations of the paragraph, this defendant says that he has neither knowledge nor information sufficient to form a belief and therefore denies the same and each and every part thereof.

III.

Answering the third paragraph of the fourth cause of action, this defendant says that he has neither knowledge nor information sufficient to form a belief as to the truth or falsity of the matters therein stated and therefore denies the same and each and every part thereof.

IV.

Answering the fourth paragraph of the fourth cause of action, this defendant denies the same and each and every part thereof.

V.

Answering the fifth paragraph of the *fifth* cause of action, this defendant admits that he has not paid the sum of $4189.50 mentioned therein; denies each and every other [97] allegation in said paragraph contained.

VI.

Answering the sixth paragraph of the fourth cause of action, defendant says that he has neither knowledge nor information sufficient to form a belief and therefore denies the same and each and every part thereof.

For a further and first affirmative defense to the seventh amended complaint of the plaintiff, this defendant alleges:

I.

That the Pacific Cold Storage Company is a corporation organized under the laws of the State of Washington with its principal place of business in the City of Tacoma, Pierce County, Washington; that said corporation was organized on or about the 8th day of April, 1897, with a capital stock of $150,000; that subsequently the capital stock of said corporation was increased to $500,000 and later increased to $1,000,000 consisting of 10,000 shares of the par value of $100 each; that at the time of the first and second increase of the capital stock of the corporation, a large percentage of the capital

stock of said corporation was acquired, held and owned by resident of Glasgow, Scotland, and other places in Great Britain; that more than 90 per cent of the capital stock of said corporation was owned and held by residents of Great Britain long prior to June 1, 1911, and down to the date of the dissolution of the corporation.

II.

That by reason of the fact that such a large percentage of the capital stock of the corporation was held in Great Britain, an advisory committee was appointed by the stockholders residing in Great Britain with the consent and approval of the defendant and of all of the stockholders of said corporation [98] residing in the United States; that the creation of said committee was the joint action of all of the stockholders of the corporation. This defendant alleges upon information and belief that the advisory committee was created by a written agreement of the stockholders at that time residing in Great Britain and that the stockholders residing in the United States verbally assented thereto and acquiesced therein; that in any event, whether said agreement by the foreign stockholders was in writing, nevertheless, the advisory committee was appointed by the verbal consent of the stockholders residing in Great Britain; that the defendant has no copy of such writing and does not know the date thereof by that said advisory committee was appointed about the time of the first increase of the capital stock of the corporation and

continued to be appointed and maintained down to the date of the dissolution of the corporation as hereinafter stated; that the appointment of the advisory committee for the stockholders in Great Britain was continuously verbally approved by the stockholders in Great Britain and in the United States; that the creation, maintenance and continuance of said advisory committee was the result of the unanimous action of all of the stockholders of the corporation verbally expressed from time to time at the annual meetings of the stockholders in the City of Seattle and at the meeting of the stockholders approximately the same time residing in Great Britain. That no resolution appears upon the minutes of the meetings of the trustees or stockholders of the corporation but that affirmative action was taken at such meetings verbally; that all important business affecting the affairs of the corporation and its operations was submitted to the advisory committee for its approval; that said advisory committee by the consent of each and all of the stockholders of the corporation verbally given was clothed with powers to enable it to control and regulate and dictate the policies of the corporation, subject only to the approval of the board of trustees of the [99] corporation; that such action by the board of trustees of the corporation was taken at the annual meeting of the stockholders and at the first meeting of the board of trustees after each stockholders' meeting but not spread upon the minutes; that it was agreed by each and all of the stockholders of the corporation that such advisory com-

mittee should have the same powers with regard to the control of the management of the affairs of the corporation as a board of trustees or directors would ordinarily possess and exercise; that such action was verbal but was the action of the stockholders individually and the action of the board of trustees; that full and complete statements and reports of all of the important business of the corporation was submitted to such advisory committee for its approval before action was taken thereon and that the officers of the company continuously and uniformly complied with the requests of such advisory committee in the conduct and management of the affairs of the corporation at all times. That Mr. David Inglis was the secretary of said advisory committee from the date of its creation to the date of the dissolution of the corporation, and that all statements, audits and reports were sent to the advisory committee in care of the said David Inglis. That the correspondence between the said David Inglis and the corporation has been submitted to the plaintiff, that is to say, copies of letters from the corporation to Inglis have been submitted to the plaintiff and the original letters from Inglis to the corporation touching such matters have also been submitted to the plaintiff.

III.

That from the year 1901 until the date of the dissolution of the corporation, on or about the 3d day of June, 1919, the defendant, Charles Richardson, was the president and a member [100] of the board of trustees of said corporation and had active

charge and management as such president of the affairs of said corporation performing the duties prescribed by the by-laws of the corporation; that for several years prior to January 1, 1911, the said defendant, as such president, drew a salary of $1,000 per month; that on or about the 14th day of December, 1910, the defendant communicated with the advisory committee and indicated that he was not satisfied with the salary that he had been drawing as such president and requested some additional compensation; that on the 13th day of January, 1911, the said advisory committee in answer to the defendant's letter of December 14, 1910, wrote the defendant as follows:

> "As regard your own remuneration—Since you raised the point a short time ago, the Board have had the matter before them, and it was their intention that they would shortly have made you a proposal that you be allowed by way of increased emolument, and annual commission or bonus on the total amount of dividend paid to the shareholders in each year. Such bonus, they propose should be at the rate of 2½% beginning with the current year."

That the defendant accepted such proposal and agreed to accept by way of additional compensation for his services a sum from the corporation equal to 2½% upon the amount of the annual dividends paid by the corporation to its shareholders; that the arrangement thus made between the advisory committee and the defendant was communicated by the defendant to the board of trustees of the cor-

poration and was in all things approved by the trustees of the corporation annually at the various meetings of the board of trustees and particularly at the first meeting after the annual stockholders' meeting; that no record of the resolution approving such arrangement was placed upon the minutes but that the resolution was adopted by the unanimous vote of the trustees at such meetings verbally; that such arrangement for additional compensation in the amount above stated was thereafter with the consent and approval of the board of trustees of the company, continued until January, 1918, [101] covering the intervening years from January 1, 1911, to December 31, 1917, inclusive, and that said additional sum was equal to 2½ per cent of the amount of the dividends declared and paid to the stockholders and was paid to the defendant on or before the first of January of each year of said period, and at the meeting of the board of trustees held about the time the payment was made, the matter was brought before the board and continuously adopted by verbal action of the board but no record was made thereof upon the minutes.

IV.

That all dividends declared by the corporation were paid by the corporation to the shareholders in the amounts of the dividends so declared; that no portion of said 2½ per cent was deducted from the dividends declared to the shareholders, that the shareholders received the full amount of the dividends annually declared during said period but that said 2½ per cent additional emolument or compen-

sation to defendant's salary was paid by the corporation and that the amounts so paid were measured by the computation of 2½ per cent upon the annual dividends declared and paid to the shareholders; and that such payment of 2½ per cent was *a*rtified and approved by the action of the board of trustees of the corporation and by the stockholders of said corporation; that the authorization of the payment of said additional compensation of 2½ per cent was authorized by the board of trustees, by the advisory committee and by the stockholders prior to the several dates upon which the same were paid to the defendant as such additional compensation for his services as president of the corporation; that the arrangement for the additional compensation hereinbefore set forth and the action taken by the board of [102] trustees thereon as stated in the preceding paragraphs is hereby referred to and made a part of this paragraph.

V.

That at the time such arrangement for such additional compensation of 2½ per cent was made, and continuously thereafter until about the first of June, 1918, the plaintiff Frederick L. Denman was the secretary and auditor of the corporation and that it was his duty as such auditor and secretary to keep the record and account-books of the corporation and to make up vouchers explanatory of all disbursements; that from year to year as such additional compensation was paid by the corporation to the defendant, the said plaintiff, Frederick

L. Denman, made up such vouchers; that the explanation upon the vouchers for such additional compensation was substantially as follows:

> "Extra on 2½ per cent of total dividend as per order on file."

together with the amount so paid to the defendant; that the order on file referred to in vouchers by the said plaintiff, Frederick L. Denman, was the agreement or order of the said advisory committee; that each year the account-books of the corporation were audited and a report of such audit made and in such audits so annually made the 2½ per cent additional compensation was included and explained; that such audits were submitted to the advisory board and to the stockholders represented by the advisory board and were approved by them and that such audits were submitted to the board of trustees annually and to the stockholders' meetings in the City of Tacoma, and were approved by the board of trustees and by the stockholders, and that the checks drawn by the corporation in payment of said additional compensation were signed by the said plaintiff, Frederick L. Denman; that the payment of such additional compensation was authorized by the board of trustees of the corporation and by the stockholders in subsequently ratified by the board [103] of trustees and by the stockholders and continued from the time the arrangement was put into effect in 1911 down to and including the year 1917 without the objection or protest or criticism of any stockholder or officer and during a considerable portion of the period the said Fred-

erick L. Denman was one of the trustees of the said corporation. That the audits referred to in this paragraph were in writing and were prepared usually by Eli Moorehouse & Co. chartered accountants and that such reports were then submitted to the plaintiff. That on January 13, 1912, the defendant wrote the following to Frederick L. Denman:

"Tacoma, Wash., Jan. 13th, 1912.

"F. L. Denman, Auditor,
Pacific Cold Storage Company,
Tacoma, Wash.

Dear Sir:

By virtue of a resolution passed by Advisory Board at its Annual Meeting in January, 1911, I was voted two and one-half (2½) per cent as a bonus on all Dividends declared, in addition to my salary.

You will therefore issue me a check for two and one-half per cent of the Dividend in addition to my regular dividend.

Yours truly,
CHARLES RICHARDSON,
President."

That remittance statement No. 19982 contained a check in favor of Charles Richardson for $2500, which was entered in the Pacific Cold Storage Company's Audited Voucher Record, at page 23, under date of Jan. 13th, 1912, and was charged to Office Expenses. In like manner and in similar vouchers defendant was paid $2500 in 1913; $2500.00 in 1914, $1500 in 1915, $2000 in 1916, $2000 in 1917 and $5000 in 1918. These payments are all shown on the books of the company and are included in

the annual reports prepared by its auditor who was at that time the plaintiff, and by chartered accountants. On page 232 of the Record of Trustees' meetings, dated January 7, 1913, the following resolution was made: [104]

> "Upon motion of Mr. Davis, seconded by Mr. Denman (plaintiff), it was unanimously carried that the Report of the President covering the year ending September 30, 1912, together with the statement of assets and liabilities and profit and loss account for the same period, be approved and adopted."

The payment of $2500 in 1912 was a part of the profit and loss account. Again on page 243 under date of January 15, 1914, the following record was made:

> "Reports of the officers for the year ending September 30, 1913 were approved, accepted and placed on file."

These reports included the annual statement of accounts, including the payment to Mr. Richardson of $2500 in 1913. As to the years 1914 and 1915, no formal action was recorded but the action was taken as hereinbefore stated. On May 31, 1917, the following record appears:

> "Moved, seconded and unanimously carried that the accounts as presented by the chartered auditors, Moorehouse & Co., be approved, and the Acts of the Board of Trustees were also approved."

This refers to the accounts of 1916 including the $2000 paid Mr. Richardson that year. At the an-

nual meeting of the stockholders on May 31, 1918, the following resolution was adopted:

> "Resolved.That the annual accounts as audited by Eli Moorhouse & Company, Chartered Accountants, for the year ending September 30th, 1917, now on file, be and the same are confirmed and approved."

These annual accounts included $2000 paid Mr. Richardson in 1917. But at all of the meetings of the trustees declaring dividends the arrangement as to the 2½ per cent additional compensation was unanimously approved, although not spread upon the minutes in all cases.

VI.

That about two years prior to the 31st day of May, 1918, the defendant submitted to the advisory board a suggestion of liquidating the corporation and at such time suggested that if it were finally decided to liquidate the corporation, defendant [105] thought that he should be paid a commission upon the amount of money realized from the sale of the assets and their conversion into money and further indicated to said advisory board that he considered five per cent upon the amount so realized as a reasonable and just compensation; that the advisory board authorized and approved the payment of said commission of 5 per cent and that said agreement so made between the advisory board and defendant was thereafter ratified and approved by the board of trustees of the corporation and by the stockholders thereof; that the approval herein referred to is set forth in the exhibit attached to

the answer. That at the meeting of the stockholders of the corporation held on the 31st day of May, 1918, the following resolution was unanimously adopted:

> "WHEREAS, it is desired by the stockholders that the company should be liquidated and all of its assets sold and that a return of the capital be made as speedily as possible,
>
> "THEREFORE BE IT RESOLVED that the officers of this company are directed to sell and dispose of all of the assets of the company as rapidly as possible and wind upon its affairs returning to the shareholders the amount therefore."

That said corporation was not, however, dissolved until the 1st of June, 1919, when an order was duly entered in the Superior Court of Pierce County, Washington, dissolving and disincorporating said company. That on or about the 31st day of May, 1918, the defendant submitted to the advisory board a proposal to convert the assets of the company into money and to devote his time to the liquidation of the corporation for a commission of 5 per cent on the amounts returned to the shareholders, his salary to cease on Sept. 30, 1918; that out of this commission he would pay all commissions and attorneys' fees that he found necessary to be paid in winding up the company, excepting amounts paid in connection with the sale of the "Elihu Thompson" a vessel belonging to the corporation, and that he would retain the services of R. F. Davis and B. A. Moore for as short a time as possible, who should be paid their present salaries [106] by the corpora-

tion. He further stated to the advisory board that it was not his intention to engage in any other business until the company's affairs had been wound up and complete returns made to the shareholders; that this would preclude him from earning anything else during such time; that he hoped to liquidate the company within a year but that contingencies might arise that would require his services for a longer period; that while it should be optional with him, he expected to pay out of his commission of 5 per cent, any other officers of the corporation who might be of assistance to him in closing its affairs; that on the 18th of August, 1918, the advisory board agreed to said proposal for remuneration as stated in defendant's letter of July 12, and later and on the 21st of August, 1918, said proposal was further accepted by letter from the advisory board; that immediately upon the receipt of said cablegram or wire from the advisory board the proposed arrangement by which the defendant should receive a commission of five per cent upon the amounts returned to the shareholders was submitted to the board of trustees of the corporation and the same was approved by them and accepted by the defendant and the agreement consummated; that later, and on the 7th of January, 1919, the arrangement for the payment of said commission of five per cent to the defendant was again brought before the board of trustees at a meeting of such board held on said date, and a resolution was duly adopted by the unanimous vote of the board of trustees with the

exception of the defendant, who did not vote thereon said resolution being as follows:

"WHEREAS it appears from correspondence between Charles Richardson and the Advisory Board of Glasgow, as shown in a letter from Mr. Richardson of July 12, 1918, and cable in reply of August 18, 1918, and letter of confirmation of August 21, 1918, that an agreement as to compensation to Mr. Richardson for his services in winding up the company and disposing of the assets has been reached so far as it affects a large majority of the shares of the company, and [107]

"WHEREAS, it appears that said agreement is fair and just and that such compensation is reasonable,

"THEREFORE BE IT RESOLVED that the offer contained in the letter of Mr. Richardson of July 12, 1918, be, and the same is hereby accepted and the agreement as set forth in the correspondence between Mr. Richardson and the advisory board as herein referred to be, and the same is hereby confirmed and ratified and the officers of this company are authorized and directed to pay the compensation therein named and to fully carry out all of the terms of said agreement."

That the resolutions referred to are set forth in Exhibit "A" attached to the answer. That the proceedings taken at said meeting of the Board of Trustees are all found in Exhibit "A" attached to the answer. The *the* foregoing resolution was of-

fered at said meeting by Mr. Harold Seddon, who moved its adoption, which was seconded by Mr. Charles A. Miller, the owner at the time of 798 shares of the capital stock of the company, being the same Charles Miller named in paragraph II of the second and fourth causes of action.

VII.

That prior to September 1, 1918, the defendant sold and disposed of a portion of the assets of the corporation and shortly after the first of September, 1918, the corporation declared a dividend by way of a distribution of the capital assets of the sum of $500,000.00 and the same was paid by the corporation to its stockholders and later, and on or before June 1, 1919, the defendant converted other and additional assets of the corporation into money in the sum of $500,000.00 and the same was distributed by way of a dividend in the distribution of the capital assets of the corporation on or about the 2d day of June, 1919, and the same was received by the shareholders and a further dividend was declared and paid in the sum of $50,000, making a total distribution of the capital assets to the stockholders in the sum of $1,050,000.00; that said agreement for the payment of said commission of five per cent was approved by the advisory board and approved by the board of trustees of the corporation prior to its payment and was subsequently ratified by the [108] action of the shareholders; that the payment of said commissions was authorized by the board of trustees; that the large returns to the stockholders was due to the efforts of the defendant

in making advantageous sales and disposition of the assets; that if the said defendant had not sold said assets at the time they were sold, the returns to the stockholders would have been less by the sum of several hundred thousand dollars; that the defendant procured the most advantageous and favorable sales of said assets; that the defendant ceased drawing his salary of $1000.00 per month on the 30th of September, 1918, in accordance with his said agreement; that at the time said agreement was made for the commission of five per cent the defendant did not know and could not know whether his time would be consumed for a period of one year or two or three years; that it might have taken even a longer time than three years had not the defendant been particularly zealous and successful in the prompt sale and disposition of said assets; that the ratification referred to is shown by Exhibit "A" and by the proceedings of the board of trustees held on January 7, 1919.

That on the 31st of May, 1919, the following named persons at a meeting of the stockholders of the corporation were elected trustees, to wit: Charles Richardson, Harold Seddon, B. A. Moore, E. J. Walsh, Ralph S. Stacey, H. C. Schweinler and R. J. Davis, who duly qualified by taking the usual oath of office and entered upon the performance of their duties as trustees; that on the first day of June, 1919, said corporation was dissolved by an order of the Superior Court of Pierce County, Washington, as aforesaid; that the above-named persons were duly elected, qualified and acting

trustees of said corporation at the time of its dissolution and thereupon became the trustees of the creditors and stockholders of the corporation with full power and authority to sue and recover the debts and property of the corporation by the name of the trustees [109] of said corporation with authority to collect and pay the outstanding debts, settle all of the affairs of the corporation and divide among the stockholders the money and other property that remained after the payment of the debts and necessary expenses; that in their capacity as such trustees under the provisions of Section 3707 of Remington's Code of the State of Washington, said trustees became possessed of the money theretofore in the treasury of the corporation and the said trustees distributed the same by way of dividends and return of the capital stock to the shareholders, which distribution was made on or about June 3, 1919. That since said date all of the affairs of the corporation have been managed and controlled by said board of trustees hereinbefore named and not by this defendant except insofar as he was a member of said board of trustees.

VIII.

That the said defendant at no time ever owned or controlled more than 1353 shares of the capital stock of said corporation; that all sums paid to this defendant were authorized previous to such payments by the board of trustees and by the stockholders and were subsequently ratified and approved by the stockholders, and that as to the 798 shares formerly owned by Charles A. Miller, the

said Charles A. Miller voted affirmatively in favor of a resolution of the board of trustees authorizing the payment of the same as a fair and just compensation for the services to be rendered and that the said Frederick L. Denman acquired said 798 shares with full knowledge of the fact that the said Charles A. Miller had affirmatively approved the payment of said commissions to this defendant and that the said Frederick L. Denman, himself, and as the successor of the stockholders named in the amended complaint, likewise ratified and approved the action of the board of trustees in the payment of the 2½ per cent commissions hereinbefore referred to. The authorization referred to is shown by [110] the minutes of the meeting of Jan. 7, 1919, heretofore referred to and the authorization was also approved by the board of trustees at meetings at which the trustees were present, held during the summer of 1918 and in the fall of 1918.

SECOND AFFIRMATIVE DEFENSE.

For a further and second affirmative defense to the third and fourth causes of action set forth in the seventh amended complaint, defendant alleges:

I.

That the services performed by this defendant in winding up the affairs of the corporation and in selling and disposing of the assets and in the conversion of the same into money and the distribution of the same to the stockholders were services rendered outside the scope of his official duties as president and trustee of the corporation; that the reasonable and fair value of the services rendered

to the corporation by this defendant outside the scope of his official duties as president and trustee was the sum paid by the corporation for such services; that even though there was no express contract between the corporation, its trustees and stockholders for the payment of said services, the defendant is entitled to the sums paid for the reason that they were reasonably fair and just for the services rendered outside the scope of the official duties of the defendant as provided by the by-laws of the corporation, and that and implied contract was created for such services even though the Court should hold that there was no express contract for the payment of the amount received by the defendant in the winding up of the corporation, the conversion of its property into money and the distribution of the same among the stockholders. [111]

THIRD AFFIRMATIVE DEFENSE.

For a further and third affirmative defense to the seventh amended complaint, defendant alleges:

I.

That *be* reason of the actions of the said Frederick L. Denman and Charles A. Miller and by reason of the acts and things done and performed by them as set forth in the first affirmative defense, to which reference is hereby made and the same is hereby made a part of this third affirmative defense, the said plaintiff is estopped from claiming a return of said commissions, or any part thereof from this defendant; that as to the $1436.40 claimed by the plaintiff in the second cause of action, the payments

were made in January, 1912, 1913, 1914, 1915, 1916, 1917 and 1918; that this action was not commenced until more than three years after January, 1918, to wit, on November 21, 1921, as to the second cause of action and that the liability of the defendant, if any, accrued more than three years before the commencement of the second cause of action and is barred by the statute of limitations.

FOURTH AFFIRMATIVE DEFENSE.

For a further and fourth affirmative defense to the seventh amended complaint, this defendant alleges:

I.

That as to the first cause of action, the payments were made in the months of January, 1912, down to and including January, 1918, and that all of the amounts claimed by the plaintiff in the first cause of action accrued, if at all, more than three years prior to the date of the commencement of this action except as to the payments in January 1917 and 1918, and that the same are barred by the statute of limitations. [112]

FIFTH AFFIRMATIVE DEFENSE.

For a further and fifth affirmative defense to the seventh amended complaint, this defendant alleges:

I.

That at the time of the commencement of this action, the said Charles A. Miller was the owner of 798 shares of the capital stock of the Pacific Cold Storage Company; that no claim of the said Charles A. Miller accrued while he was the owner

and holder of said 798 shares of stock; that no assignee of the claim of Charles A. Miller so accruing can be maintained in the courts of the United States under Equity Rule 94, or at all, either in law or in equity,

WHEREFORE, having fully answered, the defendant prays that he be dismissed hence with his costs and disbursements in this action expended.

KERR, McCORD & IVEY,
Attorneys for Defendant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. May 31, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [113]

Reply to Amended Answer to Seventh Amended Complaint.

Plaintiff for reply to the amended answer of the defendant to plaintiff's seventh amended complaint:

I.

Denies each and every allegation in the first, second, third, fourth and fifth affirmative defenses of said amended answer, except such matters hereinafter expressly set forth, alleged or admitted.

II.

Plaintiff admits the allegations of paragraph "I" of the first affirmative defense contained in lines 4 to 19 of said amended answer save and except that plaintiff denies that more than seventy per cent of

the capital stock of said corporation was owned or held by residents of Great Britain.

III.

Plaintiff denies each and every allegation of paragraph "II" of said amended answer commencing with line 20 on page 7 and ending with line 21 on page 9 thereof; save and except that plaintiff admits as defendant confesses, that defendant does not know of any writing defining the purposes or powers of said pretended advisory board; and also as confessed by defendant, that no express sanction for the powers alleged to have been exercised by said advisory board exists in the records of said corporation or by contract in writing.

IV.

Plaintiff admits the allegations of paragraph "III" of said first affirmative defense commencing with line 22 and ending with line 29 on page 9 concerning defendant's salary and relations to the Pacific Cold Storage Company. [114]

Plaintiff has no knowledge or information sufficient to form a belief as to negotiations alleged to have been conducted by defendant with David Inglis and said advisory committee pursuant to design or scheme of defendant to obtain compensation, therefore denies each and every allegation concerning such negotiations contained in paragraph "III" of said affirmative defense commencing on line 30 of page 9 and ending with line 13 of page 10.

Plaintiff denies each and every other allegation of paragraph "III" of said affirmative defense commencing with line 14 on page 10 and ending with

line 2 on page 11; save and except, however, that plaintiff admits, as confessed by defendant, that said pretended negotiations conducted between Inglis and Richardson do not now and never had the sanction of any contract in writing or record on the part of the Pacific Cold Storage Company, its trustees or stockholders.

V.

Plaintiff admits the allegations commencing with line 3 and ending with line 12 on page 11 of said amended answer except that plaintiff denies that said two and one-half per cent taken by the defendant was paid, sanctioned or authorized by the corporation; plaintiff denies each and every other allegation in the remaining lines of said paragraph commencing with line 13 and ending with line 24 on page 11.

VI.

Plaintiff denies each and every allegation contained in lines 25 to 31 on page 11 of said amended answer except that plaintiff admits that at the times mentioned he was secretary of said corporation and that he kept its records, its books and accounts, plaintiff being the treasurer as well as the secretary and not the auditor of said corporation. [115]

VII.

Plaintiff denies each and every allegation contained in lines 1 to 27 on page 12 of said answer save and except that plaintiff admits that until May 31, 1918, he was one of the trustees of the Pacific Cold Storage Company; plaintiff further admits that the vouchers on file for payment of said two

and one-half per cent additional compensation contained and quoted, among others, the words: "as per order on file."

Plaintiff denies that there was any order on file except the command in writing by defendant himself addressed to plaintiff and set forth by copy on lines 3 to 11 on page 13 in defendant's answer, whereby defendant ordered payment to himself; and that such and no other constituted the order referred to in said vouchers. Plaintiff denies that defendant ever produced or made a matter of record or filed with said corporation or communicated to its trustees or stockholders any correspondence, writing agreement or record with any stockholder or group of stockholders authorizing him to have additional compensation of two and one-half per cent; and plaintiff further denies that the subject of such additional allowance was ever reported to said trustees or proposed to them by said defendant or that such additional compensation was ever discussed in any meeting of trustees or stockholders of said corporation.

VIII.

Plaintiff admits the allegations contained in lines 28 to 31 on page 12 of said amended answer to the effect that accounts of said corporation were audited by Eli Morehouse or Eli Morehouse & Co., but denies that said reports were submitted to plaintiff or delivered to him for any purpose other than filing. [116]

IX.

Plaintiff admits the allegations of lines 1 to 11 on page 13 of said amended answer containing copy

of the letter whereby defendant ordered plaintiff to make vouchers or check for said additional two and one-half per cent payable to defendant himself.

X.

Plaintiff admits the allegations commencing with line 12 on page 13 and ending with line 11 on page 14 of said amended answer as to vouchers and checks to defendant and resolutions of trustees approving accounts except that plaintiff denies (page 13, lines 18 to 20) that he was auditor or prepared any annual reports or that the reports prepared by chartered accountants contained any reference to the fact that defendant was taking two and one-half per cent in addition to his salary.

XI.

Plaintiff denies each and every allegation commencing with line 13 and ending with line 17 on page 14, and particularly denies that at any meeting of trustees there was any mention or approval, either oral or written, as to whether defendant was claiming two and one-half per cent in addition to his salary or to the effect that he was taking such additional amount.

XII.

Plaintiff alleges that he has no knowledge or information sufficient to form a belief as to the allegations commencing on line 18 and ending with line 29 of page 14 of said answer as to when defendant began to plan or scheme to secure for himself a part of the funds to be paid to stockholders on dissolution of the corporation and therefore denies

each and [117] every allegation in said lines 18 to 29.

XIII.

Plaintiff denies the allegations of lines 29 to 31 on page 14 of said amended answer and particularly denies that the stockholders of said corporation or any committee of stockholders ever ratified or approved payment to defendant of five per cent of the capital return of said corporation and denies that the board of trustees of said corporation in advance of its dissolution gave any sanction, written or verbal, as to disposition of stockholders' funds or had at any time any authority from stockholders or any right or sanction in law or fact to do so.

XIV.

Plaintiff admits the allegations commencing with line 2 and ending with line 7 on page 15 of said amended answer to the effect that the stockholders voted on May 31, 1918, to dissolve the corporation; plaintiff further admits the allegations of lines 9, 10, and 11 on page 15 to the effect that decree was entered dissolving said corporation on June 1, 1919. Plaintiff denies that said corporation was not dissolved until June 1, 1919.

XV.

Plaintiff alleges that he has neither knowledge or information sufficient to form a belief as to the allegations commencing with line 11 on page 15 and ending with line 13 on page 16 of said amended answer as to negotiations or schemes of defendant to secure five per cent of the amounts to be returned to shareholders and therefore denies each and every

allegation commencing with line 11 on page 15 and ending with line 13 on page 16. Plaintiff particularly denies that any such negotiations for five per cent commission were ever disclosed to the trustees for the said corporation or the [118] trustees of its stockholders prior to January 7, 1919.

XVI.

Plaintiff further denies the allegations commencing with line 14 on page 16 and ending with line 6 on page 7 of said amended answer to the effect that the resolution purporting to grant defendant five per cent of returns to stockholders was adopted by the Board of Trustees on January 7, 1919, in any manner except as hereinafter stated, and further denies that said resolution was seconded by Charles A. Miller or that any consent apparently given by said Miller was more than a recognition of what he believed could not be prevented.

XVII.

Plaintiff denies each and every allegation commencing with line 8 and ending with line 31 on page 17 of said amended answer, except that plaintiff admits that prior to September 1, 1918, a portion of the assets of the corporation were liquidated and converted into cash, and that in September, 1918, $500,000 of the capital return was distributed to the stockholders of said company, and that on or before June 1st, 1919, an additional $500,000 of the capital return was distributed and paid to the stockholders of said company, and on or about the 2d day of June, 1919, an additional $50,000 of the capital return was made and paid to the stockholders of said

company, making a total of said capital return received by said stockholders in the sum of $1,050.000.

XVIII.

Plaintiff admits that by resolution of the board of trustees defendant's right to a salary ceased on September 30, 1918; defendant denies each and every other allegation commencing with line 1 and ending with line 10 on page 18 of said amended answer; plaintiff denies in particular that the resolution [119] stopping defendant's salary was in pursuance of an agreement or formed part of any agreement whereby he was to receive any other compensation whatsoever.

XIX.

Plaintiff admits the allegations commencing with line 10 page 18 and ending with line 15, page 18, and admits that on the 1st of June, 1919, an order of the Superior Court of Pierce County, Washington was entered declaring said corporation dissolved, and admits that such trustees were acting as such at the time of the dissolution of said corporation, and denies each and every other allegation commencing with line 16, on page 18 and ending with line 5 on page 19 at the end of paragraph VII.

XX.

Plaintiff denies each and every allegation of paragraph "VIII" commencing with line 6 and ending with line 27 on page 19 of said amended answer.

XXI.

Plaintiff denies each and every allegation contained in said amended answer as a second affirmative defense and found on page 20 thereof.

XXII.

Replying to the matter stated as defendant's third affirmative defense commencing with line 30 on page 20 and ending with line 13 on page 21 of said amended answer, plaintiff admits that the amounts in the total sum of $1436.40 were taken by defendant in the years as set forth; plaintiff denies each and every other allegation set forth as said third affirmative defense.

XXIII.

Replying to the matter set forth in defendant's fourth affirmative defense commencing with line 18 and ending with [120] line 24 on page 21 of said amended answer, plaintiff admits that the amounts were taken by defendant at times as stated; further plaintiff denies each and every other allegation set forth as said fourth affirmative defense.

XXIV.

Replying to the matter set forth as defendant's fifth affirmative defense commencing with line 29 on page 21 and ending with line 5 on page 22 of said amended answer plaintiff admits that at the time of the commencement of this action, Charles E. Miller was the owner of 798 shares of the capital stock of the Pacific Cold Storage Company; further plaintiff denies each and every other allegation set forth by defendant as said fifth affirmative defense.

FOR A FURTHER AND AFFIRMATIVE REPLY TO SAID AMENDED ANSWER, plaintiff alleges:

That if the said Charles A. Miller gave his formal assent to said resolution of January 7th, 1919, on

that date, it was due and owing to the fact that defendant sprung said resolution upon said Charles A. Miller and the other trustees as a surprise and defendant's stating that said resolution had the support of a large body of the stockholders, which it had not, and defendant, fraudulently then and there acting wholly in his own interests, took advantage of his trust and superior knowledge and position gained by means of his trust, to conceal all material facts relating to his pretended services and to deprive said trustees, and said Charles A. Miller in particular, of any knowledge or opportunity to protect his interests against the advantage defendant took.

G. P. FISHBURNE and
A. H. DENMAN,
Attorneys for the Plaintiff.

#1518–20 Puget Sound Bank Building, Tacoma, Washington. [121]

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jun. 9, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [122]

Stipulation Re Letters, etc., to be Used in Evidence.

IT IS STIPULATED by and between the attorneys for the plaintiff and the attorneys for the defendant that copies of all letters, statements, reports and communications sent by the Pacific Cold Storage Company and by Charles Richardson, or either

of them, to David Inglis at Glasgow, Scotland, and to the advisory committee or the said David Inglis to the Pacific Cold Storage Company or to the defendant Charles Richardson, may be introduced in evidence in this case by either party to this action without objection on the part of the other party except as to their relevancy, competency or materiality.

Dated this 25th day of October, 1922.

A. H. DENMAN,
G. P. FISHBURNE,
Attorneys for Plaintiff.
KERR, McCORD & IVEY,
Attorneys for Defendant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Oct. 27, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [123]

Verdict.

We, the jury empanelled in the above-entitled cause, find for the defendant.

W. P. BONNEY,
Foreman.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Nov. 9, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [124]

Judgment.

This cause came on for hearing on the 8th day of *November, 1923,* and a verdict by the jury was rendered against the plaintiff and for the defendant on the 9th day of November, 1922.

WHEREFORE IT IS ORDERED that the above entitled action be and is hereby dismissed and that the defendant have judgment against the plaintiff for his costs taxed at $230.19.

Done in open court this 19th day of December, 1922.

JEREMIAH NETERER,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Dec. 20, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [125]

Motion for New Trial.

Comes now the plaintiff in the above-entitled action and moves for a new trial herein on the following grounds:

1. Irregularity in the proceedings of the Court, jury and adverse party and the order of the Court taking from the consideration of the jury the claims of the plaintiff for the two and one-half per cent commission prior to the year 1917 set forth in the first and second causes of action, and the order of the Court taking from the consideration

of the jury the fourth cause of action, and the abuse of discretion by the Court by which the plaintiff was prevented from having a fair trial.

2. Misconduct of the prevailing party.

3. Insufficiency of the evidence to justify the verdict and decision and that it is against the law and evidence adduced at the trial.

4. Error in law appearing at the trial and excepted to at the time by the party making the application.

G. P. FISHBURNE,
A. H. DENMAN,
Attorneys for Plaintiff.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Nov. 10, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [126]

Stipulation Extending Time Sixty Days from November 10, 1922, for Perfecting Appeal.

IT IS HEREBY STIPULATED AND AGREED that the time for the making, service and filing of the statement of facts and bill of exceptions in the above-entitled action may be extended and enlarged until sixty days from the 10th day of November, 1922, or if the motion for new trial now pending in the above-entitled action is not disposed of until after said sixty days that the time for the making, filing and serving of the bill of exceptions or statement of facts may be extended

and enlarged until ten days after the date of disposition of said motion for new trial.

G. P. FISHBURNE,
A. H. DENMAN,
Attorneys for Plaintiff.
KERR, McCORD & IVEY,
By W. B. McCORD,
Attorneys for Defendant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Nov. 10, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [127]

Order Extending Time Sixty Days from November 10, 1922, for Perfecting Appeal.

The Court having considered the stipulation of counsel herein,—

WHEREFORE IT IS ORDERED, ADJUDGED AND DECREED that the time for the making, filing and serving of the bill of exceptions or statement of facts in the above-entitled action be and is hereby extended and enlarged until sixty days from the 10th day of November, 1922, or if the motion for trial herein is not disposed of until after said sixty days the time for the making, serving and filing of said bill of exceptions or statement be and is hereby extended and enlarged until ten days after the disposition of said motion for new trial.

Done in open court this 10th day of November, 1922.

JEREMIAH NETERER,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Nov. 10, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [128]

Order Overruling Motion for New Trial.

The Court having heard the argument of counsel on the motion for new trial herein and having duly considered the same,

WHEREFORE, IT IS ORDERED that said motion for new trial be and is hereby overruled, to which the plaintiff excepts and his exceptions are allowed.

Done in open court this 27th day of November, 1922.

JEREMIAH NETERER,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Nov. 27, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [129]

Stipulation Extending Return Day for Filing Record and Docketing Cause to March 15, 1923.

IT IS HEREBY STIPULATED AND AGREED that the return day for the writ of error and citation herein and the time for settling the bill of

exceptions and for the filing of the record and docketing of the above-entitled action in the United States Circuit Court of Appeals may be extended and enlarged up to and including the 15th day of March, 1923.

G. P. FISHBURNE,
Attorney for Plaintiff.
KERR, McCORD & IVEY,
Attorneys for Defendant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jan. 3, 1923. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [130]

Order Extending Time to and Including March 15, 1923, to File Record and Docket Cause.

The Court having considered the stipulation herein,—

WHEREFORE IT IS ORDERED that the time for the return day of the writ of error and the citation and for settling the bill of exceptions and for filing the record and docketing in the above-entitled action with the Clerk of the United States Circuit Court of Appeals be and hereby is extended and enlarged to and including the 15th day of March, 1923.

Done in open court this 8th day of January, 1923.

JEREMIAH NETERER,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jan. 8, 1923. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [131]

Bill of Exceptions and Statement of Facts.

BE IT REMEMBERED that heretofore and on the 8th day of November, 1922, the above-entitled cause coming regularly on for trial before the Honorable JEREMIAH NETERER, one of the Judges of the above-entitled court, and a jury duly called, examined and sworn to try the cause; and

The plaintiff being present in person and represented by his attorneys G. P. Fishburne, Esq., and A. H. Denman, Esq., and

The defendant being present in person and represented by his attorneys Kerr, McCord & Ivey (By Mr. McCord), and

Counsel for the respective parties having stated to the jury the facts which they expected to prove in the trial hereof, the following proceedings were had and done in the trial of this cause, to wit: [132]

Testimony of Frederick L. Denman, in His Own Behalf.

FREDERICK L. DENMAN, the plaintiff, being duly sworn, testified as follows:

Mr. Denman identified the office cash-book as identification 2, Tacoma journal file as identification 3, Tacoma office audited voucher register as identi-

(Testimony of Frederick L. Denman.)
fication 4, Gleachen sales record as identification 5, Gleachen general ledger as identification 6, reports of cash receipts and disbursements Gleachen office as identification 7, Tacoma vouchers as identification 8, Tacoma general ledger as identification 9, Gleachen record of sales as identification 10, original certificate of stock of the company as identification 11, and Gleachen transfer ledger as identification 12, and said identifications were so marked by the clerk and admitted in evidence as exhibits 2 to 12 inclusive (See Transcript, pp. 12 and 13).

The book containing the by-laws and minutes of the Pacific Cold Storage Company from its inception to dissolution was offered and admitted in evidence as Plaintiff's Exhibit 1 (Transcript, p. 22, lines 14 to 19).

Letter dated April 5, 1918, was admitted in evidence and marked Exhibit 13 and read to the jury; and also letter of September 5, 1918, was admitted in evidence and marked Exhibit 14 and read to the jury; and a letter of June 4, 1919, was admitted in evidence and marked Exhibit 15; and a letter together with an assignment, which assignment was dated September, 1919, was admitted in evidence and marked Exhibit 16 (See Transcript, pp. 23, 24).

Mr. Denman testified that commencing in November, 1917, and ending in December, 1918, the Pacific Cold Storage Company [133] sold including the Tacoma plant a total amount of prop-

(Testimony of Frederick L. Denman.)

erty to the value of $951,835.67 (See Transcript, pp. 32, 33), and that nothing was sold after January 1, 1919, except office supplies of the value of $875.00 and accounts of the value of $309.99 (See Transcript, p. 35, lines 24 to 28, inclusive, and p. 36, lines 5 to 15 inclusive), and that there were no assets converted into money after January 1, 1919, except a total of receipts in the sum of $242,552.88 (See Transcript, p. 34, lines 10 to 14, inclusive); and that said $242,552.88 consisted of notes, bonds, good accounts or liquid assets and that all of it, you might say, was bankable paper (See Transcript, p. 35, lines 17 to 24).

Cross-examination of FREDERICK L. DENMAN.

Frederick L. Denman testified on cross-examination that he had charge of the books of account for nearly eighteen years and that everything was done under his direction so far as the accounting was concerned, and that he was secretary and treasurer for a good many years and in the early days was auditor but only in the year 1912, and that in 1912, when this two and one-half per cent dividend was paid, he was auditor and treasurer; he knew of the entry on the books of the company showing Mr. Richardson was getting a salary of $1,000.00 a month and a sum equal to two and one-half per cent upon all of the dividends paid to the stockholders and he said: "In 1912, when it was first given I knew of it. I was ordered to pay it to him." (Transcript, p. 38.) He signed the last check, the one of January, 1918, for such dividend

(Testimony of Frederick L. Denman.)
and knew that these dividends were being paid every year from 1912 to 1918 inclusive (Transcript, p. 39). He said that he did not at any time ever protest to any of the stockholders or to the [134] company or at any stockholders' meeting against the payment of this two and one-half per cent commission and that he did not dare to because Mr. Richardson was the dominating party. He dominated the company. "I knew my job would be good-bye and between my job and my interest in the company I wanted to stay by and watch them." (Transcript, p. 40, lines 10, 16 and 19.) He said he was there eighteen years and protested to no one as to the dividend and that Mr. Richardson misappropriated the two and one-half per cent commission and yet since 1912 he raised no objection thereto and did not write to any of the stockholders about it and that he did not dare to do so. (Transcript, p. 41.)

Mr. Denman further testified that the page of the yearly report prepared by the accountants Robinson & Company itemizing the salary of Charles Richardson as $12,000.00, twelve months $1,000.00 a month extra based on two and one-half per cent dividend as per resolution of the advisory board $2,500.00 covering the year 1912 was not made up until the board had passed on these accounts and approved of them and this supplementary sheet itemizing the salaries was sent for the information of the advisory board. Mr. Fishburne objected to anything being introduced with regard to the

(Testimony of Frederick L. Denman.)

advisory board as there was nothing to show that there was any recognition of it in the by-laws or any minutes of the trustees or stockholders, and the Court overruled his objection and allowed him an exception (Transcript, p. 43). Over the same objection of Mr. Fishburne Mr. Denman testified that he attached to the report of Smith-Robinson & Company in the year 1912 the supplemental sheet itemizing the salaries and saw that it was mailed and sent to the advisory board in Scotland and that about eighty-five per cent of the stockholders resided [135] in Scotland at that time, and Mr. Fishburne made the same objection as to going into the matter of the advisory board and stated that as to whether it was one per cent or a dozen was immaterial. Over the same objection of Mr. Fishburne the witness testified that at the highest the percentage of stockholders in Scotland was from about sixty-five or seventy per cent according to the stock-books and that a large majority of the stock, two-thirds of the stockholders, resided in Scotland and that these reports in which the two and one-half per cent commission was referred to was sent to the advisory board, and on special examination by Mr. Fishburne the witness testified that the supplemental report itemized the two and one-half per cent commission was sent to David Inglis as secretary of the advisory board and Mr. Fishburne objected to this being gone into as the advisory board was not recognized in the by-laws or resolutions of trustees or stock-

(Testimony of Frederick L. Denman.)

holders, and moved that all of the evidence be stricken. (Transcript, pp. 45, 46.)

Mr. Denman testified that he sent the supplemental report to the advisory board because he was instructed to do so by the President of the company. (Transcript, p. 47, L. 29.) He further testified that during all of the time he never wrote to one of the stockholders in Scotland or Mr. Inglis, the secretary of the advisory board, or anyone else telling them that Mr. Richardson was grabbing off two and one-half per cent, and that he did not write to the other stockholders, the American stockholders either, and had good reason to believe they never heard of it, and that the other stockholders in England never heard of it outside of the little bunch of them. (Transcript p. 48.) He admitted that the first time he called the attention of anyone to the two and [136] one-half per cent commission was in a circular letter of May 1, 1919, sent to the stockholders (Transcript, p. 52, L. 10). He testified that on the supplemental sheet he made just as prominent the two and one-half per cent as a part of Mr. Richardson's salary as he did of the $1,000.00 a month paid him (Transcript, p. 54); that either himself or his assistants with his knowledge put it in the books of account of the company and that he supposed it was done because the advisory committee made the arrangement with Mr. Richardson to allow him two and one-half per cent commission upon the amount of the dividends and not upon the profit (Transcript, p. 55). He stated that he thought the notes of the

(Testimony of Frederick L. Denman.)

Waechter Bros., amounting to $100,000.00 were good.

Q. You think they were good but you knew nothing about it. You didn't know anything about the financial responsibility of Waechter Bros., did you?

A. Yes, I did. I always considered them good, after trading with them for many years and their meeting their obligations, I rather thought they were good; I knew them to have large interests east of the mountains and to be gentlemen of responsibility. (Transcript, p. 56.)

As a director he had knowledge of the payment of the two and one-half per cent commission and never raised any question about it but he was a dummy director for the accommodation and convenience of Mr. Richardson (Transcript, p. 57, L. 27 to 30; p. 58, L. 1). He testified that he knew something about the Alberta property and that something like $300,000.00 was realized on the property, saying: "I gave the figures here. I think that is right," and that he thought it was a good price but Mr. Richardson did not sell that. It was sold by Mr. Davis and that he knew it of his personal knowledge. Mr. Davis was the man that conducted the major [137] part of the negotiations and he made the deal (Transcript, p. 58). He said that Mr. Davis had every authority to make the sales and he knew this from the letters and records of the company, from Mr. Davis' letters to Mr. Richardson and Mr. R.'s letters to Mr. Davis. (Transcript, p. 59.)

(Testimony of Frederick L. Denman.)

As to the interest that Mr. Denman had with Mr. Miller in the Miller stock before the date of assignment he stated that Mr. Miller would buy the shares and he, Denman, had an agreement with him that in case he found a customer for it they would divide the profits, and if he, Denman, was in funds himself he would buy stock of the company that was for sale with his own resources from the stockholders, or in case he was short of funds he went to Mr. Miller and Mr. Miller put up the money and in case Denman found a customer to whom he could sell the stock he did so and they divided profits and he had a contract with Mr. Miller in that regard (Transcript, p. 61).

He said that at the meeting of the Board of Trustees of the Pacific Cold Storage Company held on the 7th of January, 1913, when there were present Charles Richardson, R. J. Davis, A. F. Albertson, F. L. Denman and Charles E. ———, that on motion of Mr. Davis seconded by Mr. Denman it was unanimously carried that the report of the president covering the operations of the company for the fiscal year ending September 30, 1912, together with the statement of assets and liabilities and profit and loss account for the same period was approved and adopted, and to the question asked by Mr. McCord, "Now, Mr. Denman, it was customary at the stockholders' meetings for resolutions to be passed approving accounts of the president and approving accounts which included this payment of two and one-half per cent commission,

(Testimony of Frederick L. Denman.)

wasn't it?" Denman answered: "That was not a lump sum." [138]

By Mr. McCORD.—That is they approved it?

A. It was not segregated at all.

Q. I understand you knew it was in there?

A. It was under the head of salaries of officers and employees. And he testified that he knew it was in there and how the item was made up (Transcript, p. 63).

He testified that from about 1908 to May 31, 1918, he attended every one of the meetings and that salaries were never discussed except by one or two resolutions, and so far as Mr. Richardson's salary was concerned and his commissions they were never discussed, never mentioned at all (Transcript, p. 67, Ll. 26 to 30), and at the top of page 68 of Transcript he again stated that he was at every one of the meetings of the trustees and the question of salary of Richardson was never mentioned at all and that he never talked to any of the trustees as to Richardson's commission, and that "he (meaning Richardson) could have what he wanted. He was dominating the meetings." He stated that he did not know whether the other trustees knew of the two and one-half per cent commission and in answer to the question: "And all of you knew that he was getting the two and one-half per cent commission?" he said: "No, I do not think so."

Q. You do not think they knew about it?

A. They may have known it. I do not know. (Transcript, p. 68.) He testified that in 1915 the

(Testimony of Frederick L. Denman.)

trustees were Charles Richardson, Albertson, Denman, Davis, Bryant, Cox and Harold Sedden and that of these trustees Denman, Davis, Sedden, Cox and Richardson must have known of the commission in 1915 (Transcript, p. 69).

He testified that in 1917 the trustees were Richardson, Denman, Davis, Cox, Sedden and C. A. Miller and that Mr. [139] Miller did not know of the two and one-half per cent commission. "He tells me he did not."

Q. He did not know anything about this two and one-half per cent commission?

A. Well, no, he did not know anything about this two and one-half per cent commission.

But he thought that he did know about the $1,000.00 salary of Mr. Richardson. "I think he told me he did. I probably told Mr. Miller."

Q. In 1918 the trustees were Richardson, Stacey, Miller, Davis, Sedden, V. A. Moore. Every one of those knew of it, didn't they?

A. They are here. They can answer for themselves; I suppose they did.

Q. You knew from your conversation with them they knew it. That is right, isn't it?

A. Mr. Miller did not know it.

At this point Mr. Fishburne objected to the testimony as incompetent, irrelevant and immaterial as to any conversation or anything about it (meaning the commission); if it was not formally adopted as a board of trustees it was immaterial.

(Testimony of Frederick L. Denman.)

Q. (By Mr. McCORD.) Knowledge was brought home to a majority of the Board of Trustees according to your testimony every year of the payment of this two and one-half per cent commission. (Transcript, p. 70, Ll. 6, 10, 19, 23 and 24 to 30.)

By Mr. FISHBURNE.—We object to that as incompetent, irrelevant and immaterial on the ground that it has to be adopted in a legal manner. It would not be any more material whether or not these men knew in an informal way of it than if members of a lodge knew of certain things.

The Court overruled the objection and Mr. Fishburne [140] excepted.

Q. I say a majority of the Board of Trustees every year knew of the payment of the two and one-half per cent commission.

A. It was never discussed in meetings.

Q. I asked you as to your knowledge of those boards.

A. Cannot testify as to their knowledge. I say that they probably knew it. That is all.

He stated that Mr. Miller voted at the annual meeting of January 7, 1919, to fix Mr. Richardson's compensation at five per cent and that he bought the Miller stock subsequent to that date in the summer of 1919 and that Mr. Miller had advised him before he bought the stock as to the fact that he had voted in favor of the adoption of the resolution fixing Mr. Richardson's compensation at five per cent Transcript, p. 71, Ll. 9, 11, 13, 14 and 15 to 30). He testified that the reason he bought the

(Testimony of Frederick L. Denman.)

Miller stock was for his own protection (Transcript, p. 72, Line 6).

He testified that a majority of the stockholders in Great Britain sent their proxies to Mr. Richardson and that Mr. Richardson himself owned about twelve per cent of the stock and that Mr. Richardson had contemplated winding up the affairs of the company for two or three years before he did so and discussed it and urged the stockholders to do it and he was getting a salary then of $1,000.00 a month. (Transcript, p. 78, Ll. 6, 7, 15 to 27.)

Redirect Examination of Mr. DENMAN.

Referring to the minute-book and to the resolution passed on January 7, 1919, awarding Richardson the five per cent commission, Mr. Denman, in reply to the question said that Mr. Ralph Stacey was the first one of the Board of Trustees. [141]

Q. (By Mr. FISHBURNE.) State to the jury what relation Mr. Richardson held to the National Bank of Tacoma at that time. (January 7, 1919.)

By Mr. McCORD.—I object to that as immaterial.

By the COURT.—Sustained.

Mr. Fishburne offered to prove that one of the Board of Trustees was the president of the bank in which Mr. Richardson was a director on January 7, 1919, and that there were three or four of these trustees who were employees of Mr. Richardson working down there for the company at that time.

(Testimony of Frederick L. Denman.)

By the COURT.—Sustained.

By Mr. FISHBURNE.—All right, allow me an exception. I was going to offer it as to Mr. Harold Seddon, who was put in there by Mr. Richardson; Mr. Moore was working for the company as bookkeeper and Mr. R. J. Davis was working for the company and all of their jobs depended on Mr. Richardson.

By Mr. McCORD.—Are you making that as an offer?

By Mr. FISHBURNE.—Yes.

By Mr. McCORD.—I object to the offer.

By the COURT.—The objection is sustained. You cannot attack anything like that. That is collateral, Mr. Fishburne.

By Mr. FISHBURNE.—Your Honor will allow me an exception. (Transcript, p. 84, Ll. 16 to 30; p. 85, Ll. 1 to 9.)

Mr. Fishburne objected to the admission of the financial reports of the auditor with the supplemental statements by Mr. Denman attached and the Court overruled his objection and allowed him an exception (Transcript, p. 85).

Continuing at the bottom of Transcript, p. 85, Mr. Fishburne said: [142]

Q. I will ask you for the reports segregating this two and one-half per cent. You prepared that did you? A. Yes.

Continuing on page 86 of the Transcript:

Q. I will ask you whether or not that supplement went to any of the stockholders. A. No.

(Testimony of Frederick L. Denman.)

Q. To whom did that go?

A. It went to David Inglis, the secretary of the advisory board, at Glasgow.

Q. I will ask you whether or not so far as you know this two and one-half per cent additional was called to the attention of any of the stockholders.

A. I have good reason to think it was not.

Mr. McCORD.—I move to strike it out as not responsive, as improper.

The COURT.—Sustained.

Q. I will ask you whether the report that went to the board of trustees and the report that went to the stockholders—excluding this supplemental report that went over there to the advisory board at Scotland—I will ask you how they referred to the salary or wages of Mr. Richardson, whether it was segregated or the two and one-half per cent was lumped with the salary.

A. It is not segregated.

Mr. McCORD.—I object to that. The books are in evidence and they speak for themselves (Transcript, pp. 86, 87 top).

In Exhibit "A" the report of September 30, 1912, Mr. Fishburne asked, "Where does that refer to the salary?"

A. Under the general heading of office and general expenses; other items of salaries of offices and employees $34,495.00 [143] and that two and one-half per cent of Mr. Richardson's salary is included in that item.

(Testimony of Frederick L. Denman.)

Mr. Denman further testified that the two and one-half per cent was not segregated but in a lump sum under the general heading of expenses, and that it occurred in the same manner in all of the years and that it was not segregated except in the supplemental report, which Mr. Denman made and sent to the advisory board in Scotland (Transcript, p. 87 bottom, 88 top).

To the question asked by Mr. Fishburne: "What if anything was said by Denman to Mr. Richardson as to making this two and one-half per cent a part of the resolutions of the board of directors?" Mr. Denman answered: "In January, 1912, Mr. Richardson informed me that he was to have the two and one-half per cent on dividends additional salary and I suggested to him that it be made a matter of resolutions, or I asked for some authority for the voucher. He said he would give me a letter instructing me to pay it to him, something I could use for authority in making payments as auditor of the company, and he did give me such a letter. He never made it a matter of record in the Board of Trustees and that is all I got." (Transcript, p. 88 bottom, 89 top.)

Mr. Fishburne offered to prove by him that a majority of the board were employees of Mr. Richardson, owed their job to him or were working for the bank of which he was a director on January 7, 1919.

Mr. McCORD.—Objected to the offer and objection was sustained and an exception allowed (Transcript, p. 90, Ll. 1 to 8).

(Testimony of Frederick L. Denman.)

Mr. Denman further testified that from 1912 down to 1918 and 1919, he could state from memory that Mr. Richardson voted a majority of the stock and that with their proxies and his own stock he controlled a majority of the stock of the company [144] all the time.

He further testified that the supplemental report was on the fly-leaf attached to the back of the report and that he always put it there right after it was made up (Transcript, p. 90 from middle of page to bottom).

Testimony of Charles A. Miller, for Plaintiff.

Examination of CHARLES A. MILLER (Witness called by plaintiff).

Mr. Miller stated he was the Miller who seconded the motion to the resolution of January 7, 1919.

Q. (By Mr. FISHBURNE.) I will ask you whether at the time you seconded that motion for a five per cent commission you knew that Mr. Richardson had been receiving a salary of $12,000.00 a year and had been getting a commission of two and one-half per cent.

Mr. McCORD.—I object to that as incompetent, irrelevant and immaterial.

The COURT.—Sustained the objection and allowed an exception. (Transcript, pp. 91, 92.)

The Court said on page 92 of Transcript: "I do not think that a party, a person may be a party to a situation such as is recited in this resolution re-

ferring to the correspondence which appears in the minutes and take affirmative action with relation to its adoption, and having the other party proceed and act upon it and then afterwards say that he did not understand it. They cannot have that issue presented in a collateral fashion. Therefore the objection is sustained. I think it would be manifestly unfair. I do not know any rule by which the Court could admit it."

Mr. FISHBURNE.—Now, in addition to that I desire to state and offer to prove that this resolution had the correspondence already incorporated in it. I offer to prove that this [145] was brought there by Mr. Richardson already typewritten, and I offer to prove that this witness did not know that Mr. Richardson was getting $1,000.00 a month prior to this time or two and one-half per cent commission, and we offer to prove that this witness was taken by surprise when he seconded the resolution.

Mr. McCord objected to the offer as incompetent, irrelevant and immaterial and the Court sustained the objection and allowed an exception. (Transcript, pp. 92, 93.)

On page 94 is a motion for nonsuit made by Mr. McCord after plaintiff rested and on page 103 the Court gave his ruling to the jury on the nonsuit in the following language: [146]

RULING ON MOTION FOR NONSUIT.

NETERER, District Judge.—There is a very recent case decided by the Circuit Court of Appeals,

Ransome Concrete Machinery Co. vs. Moody (282 Fed., page 29). That was tried before Judge Hough, Circuit Judge, sitting as District Judge, and the case was reviewed by the Circuit Court of Appeals. Judge Rogers wrote the opinion. Judge Hough very properly says that:

> "But none of the cases known to me goes so far as to lay down the rule that directors, in all honesty and for the benefit, not only presumed, but actual, of their corporation, may not hire one of their own number as general manager and increase his salary as seems best. There is no legal yardstick; every case stands on its own bottom, and the ultimate question always is whether the contract was honest and beneficial."

Now, that is a controversy between parties who did not have a contract relation.

In this case with relation to the payment of the 2½ per cent commission for the years 1912 to 1916, the plaintiff in this case knew all about it. He was secretary for a time and auditor for much of the time, and bookkeeper all the time, and I guess a member of the board of trustees all the time. He knew about this. The defendant in this case, Mr. Richardson, was a member of the board of trustees as was Mr. Denman, the plaintiff in this case. The cases which are cited here by the plaintiff, so far as endeavoring to establish a fiduciary relation between the defendant in this case and the plaintiff, have no application, and

the corporation [147] was fully advised as to this payment. The payment was inaugurated by a majority of the board of trustees, by the majority of the stockholders representing their local committee, and this was known, as the plaintiff testified on oath, to all the members of the board. A report was made every year including the entire expenses of the office, $34,000 some years and $32,000 some other years, and similar sums other years, and then a supplemental report was presented in which detail was made with relation to all of these expenses, and attached to the report. It is stated that this supplemental report was not submitted to the local board, but that it was sent to the foreign stockholders. But this payment was sufficiently brought to the attention of the corporation that it was the duty of the corporation to bring an action to recover or to cease to approve these reports, as was shown was done. The payment of this amount, if wrongful, if unauthorized, meant of course that action must be commenced by some authorized party within the period of limitation, and the statute of limitation is three years. The plaintiff in this case has no greater right than would the corporation have. The corporation would have to bring this action within three years. The plaintiff in order to bring any action to which he may be entitled or to enforce any remedy which he may have, must bring the action within three years. So that all of the years prior to 1917 are eliminated or barred by

reason of the statute of limitation, so far as the 2½ per cent commission is concerned.

Something was said that Mr. Miller was not a party to this action when it was originally instituted, is that correct? [148]

Mr. FISHBURNE.—What is that?

The COURT.—Someone said Mr. Miller was not a party to this action?

Mr. McCORD.—Suit was brought by Frederick L. Denman and Frederick L. Denman as agent and attorney in fact for Charles A. Miller. Suit was not brought in his name.

The COURT.—When was suit brought?

Mr. McCORD.—Suit was brought under assignment.

The COURT.—When was the suit commenced under the assignment?

Mr. FISHBURNE.—Why suit was brought on the assignment—

(Here counsel consulted pleadings.)

The COURT.—Never mind; you can find it later.

As to Miller and with relation to the resolution, the adoption of which he moved: He is estopped, —the resolution estops him from now questioning it in this proceeding. If he had an equitable right to have that set aside that should have been done, but he could not do it in this proceeding. The equity and legal remedies may not be blended in the Federal court. That is primary doctrine. The plaintiff in this case is estopped from claiming anything under the Miller shares of stock so far

as the 5 per cent commission is concerned; and if Miller became a party to this action prior to the period of limitation with reference to any of the 2½ per cent years of course those may be pleaded by the plaintiff. I do not think that the plaintiff's right of action is barred as to the years 1917 and 1918, and if Mr. Miller comes into this case within three years after any of those years then his action may stand likewise. [149]

Now, as to the distribution as claimed of the $500,000 prior to the adoption of this resolution: There is no testimony, as I said a moment ago, as I recall it, as to when that was paid. Plaintiff states he knew nothing about the adoption of this resolution or payment of this 5 per cent commission until afterwards, until it was paid I think he said. I do not know but what he said until after this action was commenced or about the time it was commenced. Now, I think so far as the plaintiff is concerned in this case he would not be bound or would not be estopped by that resolution for compensation which was paid or commission which was paid for services which were not actually rendered. If the $500,000 had already been collected and paid, then no service was rendered so far as this plaintiff was concerned with relation to that $500,000. The defendant would be entitled to credit for a reasonable compensation so far as this plaintiff is concerned for any service rendered in the liquidation of the concern. The defendant would be entitled to reasonable compensation for that service, whether it would be five

per cent or whatever it would be, and if he was paid the salary while the $500,000 was distributed prior to the passage of this resolution then of course plaintiff I do not think would be charged with extra compensation, and that will be the ruling of the court.

Mr. FISHBURNE.—Your Honor will allow me an exception, to your ruling?

The COURT.—Yes. [150]

Mr. McCORD.—In order to prepare my testimony, I desire to inquire—all claims prior to 1917 are barred as to the 2½ per cent?

The COURT.—Yes.

Mr. McCORD.—Both of the Miller claims and the claim of the plaintiff himself?

The COURT.—Yes.

Mr. McCORD.—And so far as the 5 per cent compensation is concerned the right of the plaintiff to recover on the shares acquired from Miller is barred, as I understand that?

The COURT.—How is that?

Mr. McCORD.—The plaintiff owns 60 shares of stock?

The COURT.—Yes.

Mr. McCORD.—And he acquired the balance from Mr. Miller?

The COURT.—Yes.

Mr. McCORD.—I understood you to say—

The COURT.—He can recover. Plaintiff may recover 2½ per cent commission on his 60 shares unless this was authorized by the board.

Mr. McCORD.—I mean as the case stands now.

The COURT.—If this is authorized by the board. As the testimony is now he may recover on his 60 shares for '17 and '18, 2½ per cent, and he may recover for his share of the $500,000 distributed in September if it was distributed, and I will permit him to show that in the morning, and he may recover also on the Miller shares for 2½ per cent commission for the years 1917 and 1918 if Miller came into the case within three years after 1917 or within three years of 1918, either of those years. [151]

Mr. McCORD.—That is as to the 2½ per cent?

The COURT.—As to the 2½ per cent, but on the Miller shares he cannot recover on anything, but he may recover on the $500,000, what would be due on his share of the 5 per cent if the defendant was paid his salary during that time and also on the balance of the amount distributed excepting that the defendant may show what would be the reasonable compensation to be paid for the services which he performed after his salary ceased.

Mr. McCORD.—Then as I understand, the Court grants the motion as to the fourth cause of action, which is the Miller claim.

The COURT.—Yes, if that is the fourth cause of action.

Mr. FISHBURNE.—The fourth cause of action is the Miller claim.

Mr. McCORD.—Yes, the fourth cause of action is the Miller claim; that is granted?

The COURT.—Yes.

Mr. McCORD.—Granted in part as to the statute of limitation?

The COURT.—Except those two years.

Mr. FISHBURNE.—As I understand the Court's ruling, the motion is not granted as to that part, so far as Mr. Miller is concerned, relative to the $500,000 of capital return.

The COURT.—Miller was barred altogether because he was there and he made the motion and knew everything that went on and he has been a member of the board of trustees and is charged with knowledge.

Mr. FISHBURNE.—Your Honor will allow me an exception.

The COURT.—Yes.

(Adjournment.) [152]

November 9, 1922.

At 9:30 A. M., the trial of this cause was resumed, the jury all being present.

The COURT.—For your information, gentlemen of the jury, I will state that last night, after you and before we adjourned, I sustained the motion in this case made on the part of the defendant to eliminate from this case all of the claims for 2½ per cent commission that were paid prior to January, 1917, and also to eliminate from the case the 5 per cent commission claimed on account of the stock held by Mr. Miller. He having moved the adoption of the resolution which authorized the payment of the 5 per cent, and the plaintiff in this case, Mr. Denman, knew of that when he acquired

that stock and Mr. Miller would be estopped to now come in in this legal proceeding and that he should recover the 5 per cent which he helped authorize to pay. So that what we are to try in this case now will be the amount of the recovery that the plaintiff in this case, Mr. Denman, may have on his 60 shares of stock, which will be 2½ per cent of the dividend paid,—I mean unless the defendant shows that he was authorized by the proper authentication which will be developed during the course of the defense; and also Mr. Miller at this time may be permitted to receive 5 per cent commission on the stock returned, except that the defendant would be entitled to a credit for the reasonable value of the service which he performed after he ceased to receive the salary that was paid him, a thousand dollars a month from time to time. I think that perhaps advises [153] you fully. The defendant will now put in his defense to show why these payments should not be allowed and then that will be the issue. The plaintiff may show this morning further when this $500,000 was paid, the first $500,000 of returned capital,—when that was actually returned.

Mr. FISHBURNE.—May it please the Court we desire to except to the Court's ruling as to the exclusion of that part of the first cause of action running back of January 1, 1917, on the ground that it is not barred by the statute of limitation because of the fact that the defendant was a trustee and it was a continuing trust, that payments from year

to year down to the year of bringing this suit were made, and that the statute of limitations does not run against the *cestui que trust* in favor of the trustee until the trust has been repudiated by the trustee and repudiation has been brought to the attention of the *cestui que trust.*

We desire to except to that part of your ruling excluding the claim of Mr. Miller on the ground that under the doctrine of estoppel a man cannot acquire property unlawfully and then set up his own wrong and try to estop an innocent person because he says he was mislead by his own wrong, the law being that estoppel cannot be plead in favor of a man's own fraud.

The COURT.—Make your objections or exceptions without argument. [154]

Mr. FISHBURNE.—And we also desire to except to that part of your Honor's ruling allowing any offset to the defendant of a reasonable compensation, on the ground first that the trustees were not given any authority in the resolution empowering them to liquidate; on the ground, second, that the trustees had no power to delegate their authority to Richardson; on the ground, third, that the trustees had no power to allow Richardson his salary; on the ground, fourth, that the trustees had no authority to approve of allowing Richardson a salary for back pay, because the resolution in itself says that this compensation is to be allowed for the service of liquidating the company, and the evidence shows that too.

The COURT.—State your objection without argument.

Mr. FISHBURNE.—I just want to call to your Honor's attention all of my points.

The COURT.—I don't care anything about that, I know what they are.

Mr. FISHBURNE.—And that after September 7, 1919, there was no liquidation, no conversion of assets into money, other than bankable paper. All the defendant had to do would be to immediately convert it into money, and there were no services rendered after this resolution of January 7, calling only for back pay; and on the further ground that at the time that his salary ceased on [155] September 30, 1919, there was no resolution allowing him any pay for services in the future. Your Honor will allow me an exception to your Honor's ruling.

The COURT.—Oh, yes, sure. I think I might say for the benefit of the record that this case was commenced as a law action, insisted upon by the plaintiff as a law action throughout the entire litigation; that the objections urged by the defendant are matters which pertain to equitable actions. In the Federal court a party may not commingle legal and equitable remedies. If the plaintiff has any relief, equitable relief, that might be urged, it must be done in an equitable proceeding, and this is not such a proceeding and has been constantly insisted upon by the plaintiff as a law action and this case has proceeded as a law action, and equi-

(Testimony of Frederick L. Denman.)

table rights, if there are any, may not be urged in a law action.

Mr. FISHBURNE.—We further desire—

The COURT.—Note exception.

Mr. FISHBURNE.—I thank you, your Honor. We further desire to object to the introduction of any evidence by the defendant.

The COURT.—Are you going to introduce any evidence now as to when this payment was made.

Mr. FISHBURNE.—Yes, I will introduce it now. [156]

The Court allowed the plaintiff exceptions to his rulings. (Transcript, p. 106.)

Mr. Fishburne further objected to the introduction of any evidence by the defendant (Transcript, p. 106).

Testimony of Frederick L. Denman, in His Own Behalf (Recalled—Redirect Examination).

FREDERICK L. DENMAN, on redirect examination (Transcript, pp. 107, 108), testified that the $500,000 that was voted but returned as a capital reduction to the stockholders was returned on the 15th of September, 1918, as shown by the cash-book page 274 and the voucher record page 202 of the books offered in evidence; and that he took his commission on said $500,000 in January, 1919, out of the remaining assets of the company.

On cross-examination Mr. Denman testified that he got his share of the $500,000 returned on the 15th of September, 1918, and that the company at that

(Testimony of Frederick L. Denman.)
date in cash and quick turning bonds had plenty of resources with which to pay the checks but that he did not know the cash balance of the company on September 15, 1918 (Transcript, p. 111, L. 13, p. 112, Ll. 2, 3, 15).

Mr. Fishburne objected to the introduction of any evidence on the part of the defendant and the Court overruled same and allowed him an exception. (Transcript, pp. 114, 115.) Mr. Fishburne also moved for judgment on the pleadings and the statement of counsel on the ground that there was no defense shown and no authority for the advisory board and no authority shown for any actions of the board of trustees and the motion was denied and exceptions allowed (Transcript, p. 115).

Testimony of Charles Richardson, in His Own Behalf.

Mr. CHARLES RICHARDSON, the defendant in the action, testified as follows:

That the question as to the liquidation of the Pacific Cold Storage Company came up the last time he was in Scotland. [157] He could not recall when but thought it was either in '13 or '14. "Some of the stockholders over there felt that in case of my death they would be helpless over here and we were discussing as early as '14 and '15 the question of selling the cold storage company as a going concern and it came up during my visit to Scotland, I think in 1914 but I cannot remember

(Testimony of Charles Richardson.)

accurately. * * * Then it continued in discussion with them and with the board here up until the final liquidation and in the correspondence with the advisory board, which is on file with the company and has been on file all the time." (Transcript, p. 118 bottom, p. 119 top.)

He was asked by counsel as to the formation and organization of the advisory board and Mr. Fishburne objected to this testimony as being incompetent, irrelevant and immaterial and the objection was overruled by the Court and his exceptions allowed. Mr. Richardson testified that when the company was organized the stock in Scotland and England was 85% of the stock and that he was unwilling to assume the whole responsibility for the company and suggested at a stockholders' meeting over there that they appoint a committee to work in harmony "with us over here," which they did and that went into effect "it seems to me, like in 1901 or '02 (Transcript, p. 119, bottom).

He further testified that during the early part of the existence of the advisory board J. A. Mitchell was secretary and he was superseded by David Inglis who had his office at Glasgow, Scotland. (Transcript, p. 119 bottom, p. 120, L. 1.)

To the question: "What was the course of dealing between you and this advisory board as to the policy of the company?" Mr. Fishburne raised the same objection and the Court made the [158] same ruling and allowed him an exception.

(Testimony of Charles Richardson.)

In reply to the question Mr. Richardson testified that from the very inception of the company and after that date "I think at one time a little more than 85% of the stock was owned over there. I think in the early days of the company I was practically the only stockholder over here. There were just a few scattered shares. I felt that they had no way of expressing their views as to the policies of the company and that I was under obligation as near as possible in every way to carry out their wishes, which I did through the history of the company."

To the question whether he communicated to them frequently, he said: "I suppose I have written thousands of letters. I made an annual report every year to the advisory board in detail and sent them the accountant's reports made by Mr. Denman and Mr. Morehous, which were on file in Glasgow and remittances were made to them and they circularized the other stockholders and most generally sent them the checks. In other words we obeyed their instructions throughout the entire history of the company." (Transcript, p. 120.)

He further testified that from the beginning of the company he called in each year a disinterested public accountant and the entire books and affairs of the company were gone over every year by these disinterested public accountants, and every year a report was made and filed in Glasgow, Scotland, and the stockholders were circularized as to what had been done and regarding the dividends and were

(Testimony of Charles Richardson.)

always consulted to determine what dividends should be paid, and that such reports were addressed to the Board of Trustees and to him as president; that as soon as the report of the accountant Mr. [159] Morehous came in and he had received from Mr. Denman his detailed statement which consisted of a statement of the salaries, amount of salary paid to various employees of the company and the operation of the steamers and in fact all the little details that were not stated in the report by the certified public accountant, that was attached to the accountant's report and as soon as he received those two he sat down and wrote from ten to fifteen or twenty pages to the advisory board stating "what we had done during the year; if there had been a loss at this point or the other and all the intimate details of the affairs of the company. These reports were filed every year and they were sent over at the same time with the statement of Mr. Denman and Mr. Morehous and the other certified public accountants; they were sent over to the advisory board and filed in Scotland for the information of the stockholders over there." (Transcript, pp. 121, 122.) In reply to the question: "If that report of the public accountant and Mr. Denman's supplemental report were brought before your stockholders at that time," he said: "They were always brought before the stockholders and trustees and the report that I made as a rule I wrote it out in pencil and called

(Testimony of Charles Richardson.)

the board together and submitted it to them, Mr. Davis, Mr. Denman and all the rest of them before I had it typed as a proper expression of the year's business so that if they had any suggestion to make it could be incorporated. Sometimes they would have suggestions to make which would be incorporated in it." He said that in the course of a month after these reports were sent over he would get an answer from Mr. Inglis and the advisory board stating in what respect they approved of the reports and whenever that was received he would call a meeting of the [160] board and read that to them and then when they had their regular trustees' meeting the accounts came up and there were no changes made in them and they were always approved by the Board of Trustees here and generally at the stockholders' meeting. (Transcript, pp. 122, 123.)

To the question whether the two and one-half per cent commission item was in the reports he said: "They were attached to the reports all the time, the reports filed here and the reports filed in Glasgow. Mr. Morehous, the chartered accountant, summarized the salaries, but Mr. Denman always gave them in detail and the detail was the same in total as the summaries that the certified public accountant made." That the reports containing reference to the two and one-half per cent commission was always brought to the attention of the Board of Trustees and approved without dissenting voice that he ever heard of. (Transcript, p. 123.) That at

(Testimony of Charles Richardson.)

everyone of the annual meetings the report of Mr. Denman showing this two and one-half per cent commission was always approved unanimously by the trustees and to the question: "And usually you say, by the stockholders?" he said: "I think so. I think the books will show that the stockholders voted on them." (Transcript, p. 124, Ll. 1 to 4, 7, 8.)

The witness then read to the jury part of identification 14–A and testified that those accounts were submitted to the stockholders every year over on the other side and on this side and offered in evidence 14–A, and Mr. Fishburne objected to it as incompetent, irrelevant and immaterial on the ground that it was a transaction between the defendant and the advisory board and the Court overruled the objection and allowed him an exception. And thereupon 14–A was marked and admitted [161] in evidence. (Transcript, p. 124, 125.) He further testified that every year while the company was in existence a report similar to Exhibit 14–A was sent to the advisory board and that "we would get back comments and criticisms from the advisory board as to how they considered it and their advice as to what proceedings we should take and how we should further conduct the affairs of the company."

At this point another report to the advisory board was marked for identification 15–A and Mr. Fishburne made the same objection to this as to the preceding report and that it was incompetent, irrelevant and immaterial as a communication to the

(Testimony of Charles Richardson.)

advisory board concerning Richardson's salary, and the Court made the same ruling and allowed an exception, and it was stipulated by Mr. McCord with Mr. Fishburne that as to these letters he could have an objection and exception to each of them, and the Court said: "Let the records show that plaintiff objects to the introduction of all of these letters of communication with the advisory board on the same ground and that the objection is overruled and an exception is noted." (Transcript, p. 125.) Thereupon Defendant's Exhibit 15–A, a copy of letter of Mr. Richardson's of March, 1917, was admitted in evidence and Defendant's Exhibit 16–A, a letter of May 1, 1917, and Exhibit 17–A, letters of March and April, 1918, to Inglis, were all marked and admitted in evidence. (Transcript, p. 126.)

Q. In order to procure the money to make your distribution and the return of your capital to the stockholders, did you have anything to do with the sale of those notes? (Meaning the Waechter notes.)

A. We did not have money enough to finish the payment and [162] we had notes, as I remember it, for something like $80,000 or $90,000, Waechter notes, two notes, I cannot recall the exact amount, but it was approximately $80,000 or $90,000. We were in the process of liquidation and I did not think we had a right in liquidation to endorse notes and so I went to Mr. Thorne in the bank and got him to take these notes on my moral representations that I would see that they were paid, without recourse, which the bank did.

(Testimony of Charles Richardson.)

Q. The Pacific Cold Storage Company endorsed them without recourse, but you guaranteed the payment of them personally.

A. Practically so, I was a director of the bank and I told Mr. Thorne I would see that they were paid. (Transcript, pp. 128, 129.)

As to the $500,000 reduction of capital stock on September 15, 1918, he testified that on that date according to his recollection the company did not have enough money by something like $250,000 to meet that payment in full. "We had some notes coming in that we could depend upon." (Transcript, pp. 129 bottom, 130 top.) As to what trouble he had with the Waechter note he testified that Mr. Stacy, the president of the bank, telegraphed him that Waechter had not met the notes "and I came up immediately from Pasadena and got hold of Waechter and arranged it so that they would get their money eventually." (Transcript, p. 130.)

Subject to the same objections by Mr. Fishburne allowed by the Court copies of letters and cablegrams of July and August, 1918, between Inglis and Richardson were received in evidence and marked Defendant's Exhibit 18–A. (Transcript, pp. 130, 131.)

To the question whether he had any discussion of this [163] proposed liquidation and the compensation to be paid him for this service with other members of the board of trustees of the company at Tacoma, he said: "I had commenced as early as

(Testimony of Charles Richardson.)

1917 before any of the assets were sold. The question of my compensation was discussed and agreed upon by the members of the board and by the board.

Q. (By Mr. McCORD.) I mean by the members of the board while the board was in session.

A. Yes, at a called meeting. The only reason it was not made of record was that we used the argument that if we gave notice to our competitors and to the public in general that we were going to sell our assets it would enable our competitors to demand a low price from us and they would think we were under compulsion and we would get a less amount for our assets.

Q. Now, on the receipt of this cablegram from the advisory board on August 18, 1918, I will ask you whether at that time a meeting of the board of trustees of your company was called and whether at that time the matter was considered.

A. It was considered. (Transcript, p. 131.)

Q. Do you recall who was present?

A. Well, I remember Mr. Denman, Mr. Davis.

Q. I mean in 1918.

A. You mean the day of the telegram?

Q. Yes.

A. Well, Mr. Davis was present at one. I cannot recall the exact date but Mr. Davis was present.

Q. Do you recall the trustees for the year 1918?

A. Yes, Mr. Davis, Mr. Seddon, Mr. Cox and Mr. Denman.

Q. Was Mr. Denman trustee in 1918? [164]

(Testimony of Charles Richardson.)

A. Yes, he was trustee, I think.

Q. What about Mr. Miller?

A. I think Mr. Miller was trustee at that time.

The witness then referred to paper and said: "Mr. Richardson, Mr. Denman, Mr. Davis, Mr. Cox, Mr. Seddon and Mr. Miller were trustees for 1917, and that Mr. Denman was not a trustee in 1918.

Q. Now, when this telegram was received from Mr. Inglis saying he accepted your proposition to do this work for five per cent, I will ask you whether or not you had a meeting of the trustees called?

A. I had and this correspondence was read to them.

Q. It was read to them and what action was taken?

A. Well, it was agreed to by all of them present.

Q. Did anybody object to it? A. Nobody at all.

Q. Was it at a regular meeting?

A. No, it had been in the files and many letters received and had been discussed for years.

Q. I mean, after the receipt of this telegram or receipt of the letter following it about the 18th of August. I want to know who was present at the meeting where this matter was considered and where you read them the correspondence?

A. I think Mr. Denman and Mr. Moore.

Q. Mr. Denman was not a trustee?

A. I thought you meant in '17.

Q. No, in 1918.

A. Mr. Stacy and Mr. Moore—and I do not know;

(Testimony of Charles Richardson.)

I cannot recall who was present. I know there was just a mass of them there.

Q. I want to know whether you called a meeting and notified [165] them in accordance with the by-laws to be present. A. I did.

Q. And at that meeting you submitted these letters and this telegram and told them all about it and they approved it as I understand it.

A. Correct; yes.

Q. But it was not spread upon the minutes of the meeting?

A. No, it was not in general, because we did not want the public to know what we were doing. (Transcript, pp. 132, 133, 134 top.)

He testified that on January 7, 1919, a resolution was introduced and that he had nothing to do with its preparation and Mr. Harold Seddon, with whom he had discussed the matter ever since 1915, wrote the resolution himself and offered it "and I submitted the correspondence with Mr. Inglis and requested a vote on it, and it was passed without any statement of mine, excepting of the introduction of the correspondence between the advisory board and myself."

Q. That action was confirmatory of the more informal action take at the meeting in August?

A. Yes, the understanding had been in existence for years.

Q. (By the COURT.) The resolution was passed January 7, 1919?

A. Yes, one of the reasons, as I say, for delay in

(Testimony of Charles Richardson.)
putting that resolution on the records was because of the negotiations we were having. For instance, take Waechter Bros.: Waechter was a competitor of ours at Fairbanks and Dawson and we knew if they got information that we had passed a resolution closing up the affairs of the company we never would be able to make a sale with him or to do any business with anybody in reference to the assets of the company and for [166] that reason all of these things were delayed. (Transcript, pp. 134, 135.)

He testified that in his judgment it was reasonably worth to convert these assets into money and distribute them back to the stockholders ten per cent, which would be something like $100,000, and to the question and answer Mr. Fishburne objected on the ground that it was incompetent, irrelevant and immaterial and it was for back service. The objection was overruled and exception allowed. (Transcript, p. 136 top.) Over the objection as incompetent, irrelevant and immaterial and with the exception allowed, he testified that every single one of the American stockholders signed a statement which Mr. McCord had there that they regarded the commission as fair and the services as rendered worth it and Mr. Denman was the only one that had ever made any complaint and 99.64% of them had agreed to it. (Transcript, p. 137 bottom, p. 138 top.) Mr. Fishburne further objected to any evidence as to what the other stockholders had done individually on the ground that if this money was

(Testimony of Charles Richardson.)
wrongfully taken from Mr. Denman it would not make any difference if all of them consented to it. (Transcript, p. 138, Ll. 15 to 20.)

He testified that he paid Mr. Davis $5,000 and Mr. Moore something like $1,000 or $1500 for assisting him after their salaries ceased and that there were quite a number of others he was going to pay as soon as this litigation was settled.

That there never was a sale of a single asset of the company "so far as I remember, or a single transaction had with regard to it that was not directed by me indirectly or directly." (Transcript, p. 139.) He testified that most of the stock that was subscribed for the company was subscribed at his instance [167] and he felt responsible for it and assumed that responsibility from the inception of the company until the winding of it up and that he decided everything. (Transcript, p. 140.)

He further testified that Exhibit 20–A, a printed circular, was received from Mr. Inglis and that similar documents were distributed by the advisory board every year on receipt of the annual reports and that he knew this from correspondence with Mr. Inglis and that Mr. Inglis would send copies of the circulars with his letters and files, and the circular was admitted in evidence and marked Defendant's Exhibit 20–A, Mr Fishburne objected to any testimony with regard to it on the ground that there was nothing to show that he knew of his own knowledge that the circular was distributed, but the Court

(Testimony of Charles Richardson.)

allowed the evidence over this objection. (Transcript, pp. 142 bottom and 143 top.)

He testified that the two and one-half per cent commission and $1,000 a month salary paid him were always discussed annually by the board of trustees at regular meetings of the Board of Trustees. (Transcript, p. 144.)

The witness further testified: "I organized the Pacific Cold Storage Company in 1897–98. The capital stock was originally $150,000, which was increased to $500,000 and later to $1,000,000."

The witness was asked to state in a general way what properties the corporation had in 1917, where they were located, and in what places and territories and in reply he stated: that the Pacific Cold Storage Company operated its plant at Tacoma on the wharf and that the company did a large freezing and cold storage business, aggregating a good many thousands of dollars a year and that they had stations at Nome, St. Michaels, Fairbanks, Tenana, Ruby, Iditerod, Eagle, Dawson, in Alaska and had two ranches in Alberta, that one of these ranches had 650 acres and quite a little bit of leased land and the other had a little [168] less than that. They had about 5,000 head of cattle and were engaged in raising and fattening cattle. That the company had a lease in Saskatchewan and about 250 horses and had cold storage steamers on the Yukon which they operated between Dawson and St. Michaels. That they had refrigerator barges that they had built and that were stationed at Fair-

(Testimony of Charles Richardson.)
banks and Iditerod and that they were operating on the rivers up there. That they operated the steamer "Elihu Thompson" between Tacoma and Alaskan ports, and also a vessel known as the "Dashing Wave" and other refrigerator boats. They shipped cattle and supplied the Government at all Alaskan ports with their meats and were doing business practically all over Alaska and on the creeks where they did not have cold storage they would send their cattle up and butcher them there and sell them to the local mining plants. The cattle from Alberta were shipped to Alaska for that purpose. They had feeding stations in Idaho and Oregon and owned property all over the Northwest. (Trans., 117.)

Over the objection of plaintiff's counsel, which was overruled and an exception allowed, the defendant testified that "when the company was organized and the stock was subscribed in Great Britain constituting Scotland and England, I was unwilling to assume the whole responsibility for the company as they had 85% of the stock, so I suggested at a stockholders' meeting over there that they appoint a committee to work in harmony with us over here, which they did, and that went into effect, it seems to me like in 1901 or 1902. * * * I felt that they had no way of expressing their views as to the policy of the company and that I was under obligation as near as possible in every way to carry out their wishes, which I did through the history of the company," that he wrote thousands of letters to

(Testimony of Charles Richardson.)

Mr. Inglis, the Secretary of the advisory board in Scotland and that he made annual reports every year to the advisory board and sent the accountant's reports made by Eli Moorhouse & Co. and the supplemental report made by Mr. Denman, which were placed on file in Glasgow and that remittances were made to Mr. Inglis and the remittances were sent out with circularized letters to the stockholders. That the board of trustees of the company followed, during its entire history, the advice and directions of this advisory board, which represented 85 per cent of the stockholders of the company. That each year he called in *a* disinterested [169] certified public accountants like Price, Waterhouse & Co. and Eli Moorhouse & Co., and that the 2½ per cent commission was always brought to the attention of the board of trustees and approved every year without dissent so far as he had ever heard, and at a regular meeting or a called meeting, and if at a called meeting after notices had been sent out according to the by-laws, and that the 2½ per cent commission was always approved unanimously by the trustees, and to the question: "And usually, you say, by the stockholders?"

A. I think so. I think the books will show that the stockholders voted on them.

That the reports of the public accountants, with the supplemental report of Mr. Denman, disclosed the fact of the payment of the 2½ per cent commission from 1912 down to the liquidation of the company and that these reports were examined by the

(Testimony of Charles Richardson.)

advisory committee and as soon as the report from Mr. Inglis was received, the reports, with his criticisms and comments were taken up and approved by the board of trustees of the company and by the stockholders.

Q. Well, in reference to salaries, that is the point here, the 2½ per cent commission, was that item in those reports?

A. They were attached to the reports all the time, the reports filed here and the reports filed in Glasgow. Mr. Moorhouse, the chartered accountant, summarized the salaries, but Mr. Denman always gave them in detail and the detail was the same in the total as the summaries that the certified public accountant made.

Q. Were those reports containing those references to the 2½ per cent commission which had been paid to you, brought to the attention of the board of trustees? A. Always and approved.

Q. What is that?

A. Brought to their attention and approved every year.

Q. Without dissent voice? Or how was it?

A. Never was as I ever heard of, any dissent.

The COURT.—Let me ask for information, was this at a regular meeting of the board?

A. Yes, either a regular or called meeting. [170]

The COURT.—But if meetings were called, notices were sent out?

A. They were sent out according to by-laws.

Q. At every one of your annual meetings, as I

(Testimony of Charles Richardson.)

understand you, the report of Mr. Denman showing this 2½ per cent commission was approved?

A. Always.

Q. Unanimously by the trustees? A. Always.

Q. And usually, you say by the stockholders?

A. I think so, I think the books will show that the stockholders voted on them. (Trans., 123–125.)

Mr. Richardson testified that he negotiated the sale of the "Elihu Thompson" to the Pacific Whaling Company.

Q. And you received $142,500 net?

A. Well, we got better than that. We made him agree to carry our beef north, I think it was, for $40 a ton, and we got a contract with Waechter Bros. for $60, producing something like $160,000, less commissions that are usually paid. We got about $150,000 for it and we were carrying it on the balance sheet at $45,000. I got about $110,000 or $115,000 more for her than we were carrying it at.

Q. That was in the spring of 1918? A. Yes.

Q. What did you get in the way of cash?

A. I do not remember the exact amount, we got a little cash and we got some Canadian bonds and I think a note, and it was all safe and secure and all finally paid.

The witness stated that he sold the Alaska assets to Waechter Bros. for $125,000 in cash and $25,000 in the stock of the company.

Q. In order to procure the money to make your distribution and [171] the return of your capital

(Testimony of Charles Richardson.)

to the stockholders, did you have anything to do with the sale of those notes?

A. We did not have money enough to finish the payment, and we had notes, as I remember it, for something like $80,000 or $90,000, Waechter notes, two notes, I cannot recall the exact amount, but it was approximately $80,000 or $90,000. We were in the process of liquidation and I did not think we had a right in liquidation to endorse notes and so I went to Mr. Thorne in the bank and got him to take these notes on my moral representations that I would see that they were paid, without recourse, which the bank did.

Q. The Pacific Cold Storage Company endorsed them without recourse, but you guaranteed the payment of them personally.

A. Practically so, I was a director of the bank and I told Mr. Thorne I would see that they were paid.

The Cold Storage Company endorsed the notes without recourse. That if a sale had not been made by him at the time it was made they would still be doing business in Alaska as there never was a time subsequent to the trade with Waechter Bros. when they would have paid anything like the price that was paid for the property.

He further testified that he paid to the stockholders during his administration, as dividends, $1,300,000 and returned in addition upon the liquidation of the company $1,050,000, after the payment of all expenses. To the question as to how

(Testimony of Charles Richardson.)

much his services were worth independent of any contract, to which question Mr. Fishburne objected on the ground that it was incompetent, irrelevant and immaterial, and that it was for back services, and the objection was overruled and exception allowed, the defendant stated that it was worth 10 per cent to liquidate the company and return the capital to the stockholders independently of any contractual relations between him and the corporation.

Q. Now, I will ask you whether the American stockholders took any action with regard to approving the payment of this commission to you?

A. Every one.

Q. Every single one of them signed a statement which you have there that they regarded the commission as fair, and the [171½] services as rendered were worth it. In fact, out of all the trustees, Mr. Denman is the only one that has ever made any complaint out of it, 99.64 per cent of them have agreed to it (Trans., 137, 138).

Q. Now, in so far as the disposition of these assets was concerned Mr. Denman said you had nothing to do with it. I would like you to explain just what you did in winding up this corporation.

A. There never was a sale of a single asset of this company, so far as I remember, or a single transaction had with regard to it, that was not directed by me, indirectly or directly.

Q. Now, in the sale of the "Thomson" and other assets in Alaska?

(Testimony of Charles Richardson.)

A. I sold the "Thomson" individually myself and I had the transaction.

He also stated that he sold the Alaska properties to Waechter Bros. individually. "If I had not made the sale to Waechter Bros. we would have been doing business in Alaska until to-day. In 90 days after we sold I would not have realized 50 cents on the dollar."

Q. And all the properties in Alberta?

A. I did that through Mr. Davis and Mr. Cox, and before they went to Alberta, I had a day or two conference with them in which I directed every single thing they were to do up there.

Q. Did you know that Mr. Denman tried to organize a company to take over the assets of this company, or part of them for himself,—did you have any discussion of that sort with him?

A. That incident came up on time in a meeting and it was at the meeting in which I had explained my commission. Mr. Denman during the course of the meeting, said he thought he could organize a company that would buy up part of the assets of the company, and I remarked to him that nobody connected with the Pacific Cold Storage Company was going to buy its assets or have anything to do with the purchase of it.

Q. Did you notice in one of Mr. Denman's circular letters, notwithstanding [172] that position that you took, that you did buy some of the accounts for seven or eight hundred dollars, and realized a profit of $250 on them?

(Testimony of Charles Richardson.)

A. "It was not accounts. I think it was in reference to the stock we held in Waechter Bros. In order to get a good price for that, we had an auction sale, sold it at an auction, and at the auction I bid on it and tried to force Waechter Bros. to pay a good price, but it fell to me for something like $30000 and I afterwards sold it for $3250, or some such matter. There was a profit of $200 or $300 which I turned back to the company.

Q. "That is the only instance you bought any property?

A. "That is the only instance in which I had any interest in any of the assets of the Pacific Cold Storage Company.

Q. "And you bought it at that auction?

A. "I bid on it in order to try to get a good price and unfortunately it fell to me and then I sold it at a profit and turned the profits back to the company, as the books will show." (Trans. 141, 142.)

Q. "Now, Mr. Richardson, how does it happen that on the minute-books of the proceedings of the board of trustees there is no reference made to the fixing of salaries?

A. "Well, I do not know. I did not think that the salaries were ever put on the minutes. I have never been connected with a corporation where it was done.

Q. "Was it discussed at meetings?

A. "Always discussed.

Q. "Always agreed to? A. Yes.

(Testimony of Charles Richardson.)

Q. "And no written memorandum of it taken?

A. "No, for the reason, I think mainly, in case we wanted to change the salary during the year we would be at liberty to do so, and we did not care to make a binding contract with anybody. [173]

Q. But at the meeting of the Board of Trustees annually, were the salaries discussed?

A. Always, and agreed upon.

Q. And was your salary agreed upon and discussed? A. Always.

Q. That is this 2½ per cent commission and thousand dollars a month was discussed annually?

A. Always.

Q. By the board of trustees? A. Yes, sir.

Q. At regular meetings of the board of trustees?

A. Yes. (Trans., 143, 144.)

Referring to the Defendant's Exhibit No. 22-A Mr. Richardson testified over the objection and exception requested by Mr. Fishburne:

Q. That was continued during all the years you were president? A. Yes.

Q. That letter was received by you in due course of mail? Within a reasonable time? A. It was.

Q. Was that brought to the attention of the board of trustees?

A. Submitted to Mr. Denman, and to the board of trustees and was aproved.

Q. Now was that same relationship, arrangement, continued during the intervening succeeding years?

A. All of the time up to the last, 1918, when I

(Testimony of Charles Richardson.)

ceased to draw my salary, without objection or criticism. (Trans., 168.)

Cross-examination by Mr. FISHBURNE.

Q. You stated that prior to January 7, 1919, all this proposition of 5 per cent commission was discussed by the board of trustees, you stated that, did you not? A. Yes.

Q. Do you remember at what time that meeting occurred?

A. I do not think I could tell you, Mr. Fishburne. My memory is not very clear on it. That was done once I know in 1917 when these letters came from Mr. Inglis in regard to it. [174]

Q. And you cannot remember the date in 1917?

A. I do not.

Q. Do you remember there was some discussion in 1918 prior to January 7, 1919?

A. Yes, sir; there was.

Q. What was the date in 1918?

A. I am unable to state exactly the date, but Mr. Davis went to Alberta; it was before Mr. Davis went to Alberta some time. He can refresh my recollection about that time.

Q. Was Mr. Denman on the board in 1917 when this was discussed? A. Yes, I think he was.

Q. You think he was? A. Yes.

Q. Were all the members of the board present there? A. I do not think they were all present.

Q. How many were there, do you remember?

A. I think four, three or four.

Q. Three or four? A. Four perhaps.

(Testimony of Charles Richardson.)

Q. Do you know that all the members present, three or four discussed it at that time? A. Yes.

Q. And in 1918, how many were present to discuss it? A. I think there were four.

Q. Four? A. I think so. In 1918.

Q. And who were they?

A. I think Mr. Stacy and Mr. Moore and myself and Mr. Davis. I do not think Mr. Miller was present. He hardly ever attended any meetings. (Transcript, pp. 144, 145.) [175]

Q. And at that time that you four discussed it was there any resolutions or anything to that effect? A. No; no, there was not.

Q. No oral resolution? A. No.

Q. Just simply a discussion?

A. No, I do not think so. As I stated before, we did not think it advisable to let the minutes show anything about the dissolution and sale of the company. All this correspondence was on file in the company's office, all the time from 1917 up.

At this point Mr. Fishburne objected to the admission of any of this evidence because of the ruling in a Federal case that the mere informal meetings of the board of trustees were not sufficient and that their transactions must be had in a formal manner at a regular meeting in which all of them were there, and the Court overruled his objection and allowed him an exception. (Transcript, p. 146.)

He testified that he left for California in November, 1918, and that he was in Frisco on November

(Testimony of Charles Richardson.)
11, 1918, and that he was up here every thirty or sixty days, three or four or five times, and that he changed his residence from Washington to California when he went down there in November, 1918, sometime. (Transcript, pp. 146, 147.) He testified that the correspondence and negotiations between him and Mr. Davis with regard to the sales of the company property was conducted by correspondence and telegrams.

That when he left for California practically everything had been sold, "pretty nearly everything had been sold in November," and that some time in 1917, in regard to the Alberta [176] sales Mr. Davis and Mr. Cox and himself spent perhaps a week or ten days before he went up there discussing the whole situation and it was decided what they would do in every particular up there. (Transcript, p. 147.) The witness admitted that he sent the telegram marked plaintiff's identification or Exhibit 20 and Mr. McCord objected to its reception as being immaterial and the Court sustained the objection and allowed Mr. Fishburne an exception. (Transcript, p. 148 top.)

He stated that he sold the steamer "Thomson" before he went to California for $150,000 and that he paid Mr. Taylor of Seattle a commission for the sale of $7,500 (Transcript pp. 148, 149). To the question: "Isn't it a fact in the summer 1918, Mr. Denman made an estimate of the amount that would be returned to stockholders, within a dollar on each share, the amount that was paid on each

(Testimony of Charles Richardson.)
share with the exclusion of the five per cent commission? he said: "Mr. Denman may have done that for himself after most of our assets were sold, but the calculations I spoke of antedated that, and was over quite a little period of time before that."

Q. When the question of the five per cent commission was discussed, was Mr. Denman present at any of those meetings? A. Yes.

Q. When the five per cent commission was discussed? A. Yes. (Transcript, pp. 149, 150.)

Testimony of B. A. Moore, for Defendant.

Mr. B. A. MOORE, on behalf of the defendant, testified as follows:

That he was bookkeper and cashier of the company from August, 1901, and remained with the company until September, 1919, and was trustee in 1918 at the annual meeting. (Transcript, p. 151.) A balance sheet of September 3, 1918, was received [177] in evidence and marked Defendant's Exhibit 21-A. (Transcript, p. 155.) He testified that he was present at the stockholders' meeting on the 31st of May, 1918, and that he recalled Mr. Richardson discussing the liquidation of the company and his compensation.

Q. I will ask you whether or not the trustees who were there at that meeting acquiesced in and approved of it? (Meaning the five per cent commission.)

A. I will say so, as I remember it.

Q. Nobody opposed it? A. No, sir.

(Testimony of B. A. Moore.)

Q. Everybody was in favor of it? A. Yes.

Q. Mr. Richardson read the correspondence to you, did he?

A. Yes, sir, before the trustees. (Transcript, p. 156.)

Q. And it was approved by them?

A. It was. (Transcript, p. 157 top.)

Q. Now then, later on during the summer of 1918, do you recall when Mr. Richardson,—I will ask you whether Mr. Richardson showed you correspondence and telegrams he received from the advisory board accepting his offer to do the liquidation work for five per cent? A. Oh, yes.

That the correspondence was submitted to him and he attended a meeting of the Board of Trustees at Mr. Richardson's office about that time on notice. (Transcript, p. 157.)

Q. Do you recall whether Mr. Stacy was there or not at that time?

A. Well, in August of 1918, I think it was likely he was.

Q. What is your recollection? [178]

A. I think the meeting would not be held without his presence.

Q. Who else was there, do you recall?

A. Mr. Stacy, myself, Mr. Richardson and Mr. Davis. (Transcript, pp. 157, 158.)

He said he did not think Mr. Miller was there and he did not remember whether Mr. Seddon was there.

Q. Now, at that meeting I will ask you whether

(Testimony of B. A. Moore.)
any action was taken and was it approved or disapproved by the board?

A. It was approved by the board. (Transcript, p. 158.)

He testified that he was present at a meeting of the trustees of the company on January 7, 1919, when the formal resolution approving the arrangement for the commission of five per cent was formally adopted and that Mr. Seddon introduced the resolution and Mr. Miller voted for it and it was unanimously approved, and no objection was made to it, and that consideration of the reasonableness of his charge was one of the main features of the consideration, and they reached the conclusion that it was reasonable compensation for the services. (Transcript, pp. 158 bottom, 159.) He testified that he never heard any protest on the part of Mr. Denman as to the payment of the two and one-half per cent commission to Richardson at any time until Mr. Denman had left the employ of the company (Transcript, p. 159). He testified that the papers or vouchers accompanying the checks returning $500,000 to the stockholders of the company were dated September 15, 1918, and that he sent off checks for half a million dollars at that time, and that on that date he had about half of the said $500,000 in cash (Transcript, pp. 159, 160), and that the company in sending out these dividend checks to Scotland figured on the fact that it would have thirty or [179] thirty-five days in which to pay them and desired to make the pay-

(Testimony of B. A. Moore.)

ments as early as possible, and those checks were sent out with the expectation that the money would be there to pay them when they came back. (Transcript, p. 160.)

He stated that he never talked to Mr. Miller about the two and one-half per cent commission.

He stated that Mr. Richardson paid him $1,000, for services in liquidation of the company and it might be more. (Transcript, p. 161.)

He stated that he was connected with the company as its cashier and bookkeeper from 1901 and remained with the company until September, 1919. That he was elected a trustee at the annual meeting of the stockholders in May, 1918; that he was bookkeeper of the company and acted under the directions of the plaintiff, F. L. Denman; that he made the entry on the books increasing Mr. Richardson's salary from $1,000 per month by an amount equal to 2½ per cent of the dividends declared and paid to the stockholders; that Denman, during all of the time that he was connected with the company, never criticised this arrangement. At the time of the declaration of the dividend on September 15, 1918, the company had about $237,000 in cash and that the money was called in and paid before the return of checks that were sent to Great Britian, which took about 20 to 30 days from the date of mailing until they were returned for payment.

Q. You had on hand (September 3, 1918) $577,000 worth of stock at Gleichen unsold at that time,

(Testimony of B. A. Moore.)

and you had bills receivable of something over $200,000, it makes about $775,000 or about $800,000. Now outside of the Canadian bonds and your Liberty bonds you had assets of approximately a million, didn't you?

A. Yes, better than a million. [180]

Q. "And the condition of the company was practically the same as it had been for years, except by reason of the sale to Waechter Bros. for $125,000 of some Alaskan assets, and thesame of the 'Elihu Thomson' to the Whaling Company for $150,000, was that about right?

A. "At this date.

Q. "So that, the liquidation of the company had not proceeded anywhere except the sale of those two items prior to July 1918?

A. "I think that is true." (Trans., 150–155.)

Q. "Were you present at the meeting that was held immediately after the stockholders' meeting? (In May, 1918.)

A. Yes, sir.

Q. "Who else were on the board, if you remember?

A. "Mr. Stacy, Mr. Miller, Mr. Richardson and Mr. Davis.

Q. "Mr. Seddon? A. Harold Seddon.

Q. "Was Mr. Seddon present at the meeting held immediately after the adjournment of the stockholders' meeting? A. I think he was.

Q. "This was on the 31st of May, 1918?

A. "The 31st of May, 1918.

(Testimony of B. A. Moore.)

Q. "At the trustees' meeting, I will ask you whether you recall Mr. Richardson, discussing the liquidation of the company and his compensation?

A. "I do.

Q. "What was the amount of it?

A. "Five per cent.

Q. "I will ask you whether or not the trustees who were there at that meeting, acquiesced in and approved of it?

A. "I will say so, as I remember it.

Q. "Nobody opposed it? A. No, sir. [181]

Q. Everybody was in favor of it? A. Yes.

Q. Mr. Richardson read the correspondence to you, did he? A. Yes, sir; before the trustees.

Q. And it was approved by them? A. It was.

Q. Now then, later on during the summer of 1918, do you recall when Mr. Richardson—I will ask you whether Mr. Richardson showed you correspondence and telegrams he received from the advisory board accepting his offer to do the liquidation work for 5 per cent? A. Yes.

Q. Was that submitted to you? A. Yes, sir.

Q. Did you attend a meeting of the board of trustees at Mr. Richardson's office about that time?

A. Yes, sir.

Q. Did you attend it on notice? A. Yes.

Q. Were you notified to appear?

A. Notified of the hour.

Q. Do you recall whether Mr. Stacy was there or not, at that time?

(Testimony of B. A. Moore.)

A. Well, in August of 1918, I think it was likely he was.

Q. What is your recollection?

A. I think the meeting would not have been held without his presence.

Q. Who else was there, do you recall?

A. Mr. Stacy, myself, Mr. Richardson and Mr. Davis.

Q. Was Mr. Miller there or do you know?

A. I think not.

Q. Now, at that meeting, I will ask you whether any action was taken, and was it approved or disapproved by the board?

A. It was approved by the board.

He also stated that the reasonableness of the five per cent commission was considered on January 7, 1919, that he thought it was reasonable and the other trustees thought the same. (Trans., 150–161.) [182]

Cross-examination of Mr. MOORE by Mr. FISHBURNE.

Mr. Moore stated there was a meeting in 1918 in which this five per cent was discussed.

Q. Who was present at that meeting?

A. Well, as I say myself, and Mr. Richardson and Mr. Davis, possibly, and Mr. Stacy, as I remember it.

Q. Do you remember the date of the meeting in May, 1918?

A. No, I am sure I do not. I came in as a trus-

(Testimony of B. A. Moore.)

tee May 31, and it is not unlikely it was after that date.

Q. After May 31, 1918? A. Very likely was.

Q. Do you remember whether that meeting was called for the purpose of considering that, or for other purposes?

A. Very likely for that and possibly for other purposes. I imagine; no specific mention made.

Q. Was there any resolution? Was the matter up as a resolution that this should be adopted or was it voted on in any way?

A. Such resolution if made might appear in the record-book.

Q. But if there was no resolution, you say it would probably appear in the record-book if there was a resolution? [183]

A. It might appear. It might appear in the record and it might not appear in the record-book. (Transcript, p. 162.)

Q. Do you know whether there was ever any resolution formally coming before them?

A. The chances are as I remember there was a resolution but as to whether it was spread on the minutes I do not know.

Q. Are you sure there was a resolution made on this occasion? A. I feel very sure there was.

Q. Isn't it a fact that there was some informal discussion and there was no formal resolution adopted?

A. No, I think not. I considered it formal in-

(Testimony of B. A. Moore.)

asmuch as all of the time was given up to it, time that could have been spent in other things.

Q. You do not remember the date of it?

A. As I say, it must have been near the date of the meeting.

Q. It was not in July?

A. No, it was in 1918 but I am not sure of the date.

Q. You do not know the date in 1918? A. No.

Mr. Moore testified that on October 26, 1918, there was sufficient money turned in to take care of the liquidation of all of the checks drawn for the purpose of returning the $500,000, for which checks were given in September, 1918, and that on September 15, 1918, there was enough money to take care of the American stockholders and pay them half of their capital return, and on October 26, 1918, there was enough to take care of the European, the Scotland stockholders. (Transcript, p. 167, Ll. 1 to 13.)

Mr. Fishburne moved to strike testimony of Moore with regard to the discussion as to the five per cent, the date of [184] which Moore could not remember, on the ground that it should be part of the records and minutes of the company and it was incompetent and irrelevant under the rulings of the Court. The Court denied the motion and allowed an exception. (Transcript, p. 167, Ll. 22 to 28.)

Letter of February 9, 1911, Richardson to Inglis, and letter of January 13, 1911, Inglis to Richard-

(Testimony of Eli Moorhous.)

son, were received in evidence and marked as defendant's Exhibit 22–A, and Mr. Fishburne raised the same objection as he had done to the other correspondence between Richardson and Inglis and the advisory board, and the Court allowed him an exception and admitted in evidence said Exhibit 22–A. (Transcript, pp. 168, 169.)

Testimony of Eli Moorhous, for Defendant.

Testimony of ELI MOORHOUS, a witness sworn, testified on behalf of the defendant as follows:

That in his reports the total paid each year for salary and wages to officers and employees was summarized in one item and the two and one-half per cent extra compensation was treated in the same way as the $1,000 a month salary paid Richardson (Transcript, p. 171 bottom, 172 top). He said that the two and one-half per cent extra remuneration first arose in 1912 or thereabouts, when he asked what was the authority for it and Mr. Denman at that time referred him to Mr. Richardson. He took the matter up with Mr. Richardson when he took up other matters arising from the examination and Mr. Richardson showed him the authority from the advisory board at Glasgow for that extra remuneration. He said he did not think he showed him anything in the minutes or tell him anything about the action of the board of trustees. (Transcript, p. 172, Ll. 8 to 18.) [185]

In May, 1919, he said Mr. Denman came into his office in Seattle and also wrote him a letter re-

(Testimony of Eli Moorhous.)

questing him to make mention of these particular commissions in his next report and that so far as he could remember that was the first time his attention had been specifically turned to this two and one-half per cent extra remuneration from the time it first arose in 1912. (Transcript, p. 172, Ll. 2 to 26.) The accountant's report from November 1, 1917, to August 31, 1919, was offered in evidence and was objected to as incompetent, irrelevant and immaterial by Mr. Fishburne and his exceptions were allowed and the said report was admitted in evidence marked Exhibit 23–A. (Transcript, pp. 172, 173.)

On cross-examination Mr. Fishburne said: "Isn't it a fact that Mr. Denman suggested to you in 1912, when this 2½ per cent proposition first came up, that the matter ought to be brought before the trustees and made a matter of record?" And the witness replied: "I do not remember him saying anything to that effect."

Testimony of A. W. Sterrett, for Defendant.

A. W. STERRETT, witness called by the defendant, being duly sworn, testified as follows:

That he was the first man to be employed by the company from its formation until February, 1900, and that he was with them from 1900 until February, 1913, and was trustee of the company at the time the two and one-half per cent commission was added to Mr. Richardson's salary. (Transcript, p. 175, Ll. 6 to 16.) He testified that the

(Testimony of A. W. Sterrett.)

question came up at the last meeting he attended in 1912 "or one of the last meetings and as I remember it, we had some correspondence there from the advisory board in Scotland and it was in answer to some [186] communication or some request that Mr. Richardson had made for an increase of salary, and they offered in lieu of an increase of salary the 2½ per cent commission,—an amount equal to 2½ per cent of the amount of dividends paid to stockholders. He had requested it from them obviously because the letter referred to correspondence from him. I recall it very vividly because we joked a little about it on that occasion." (Transcript, p. 175, Ll. 18 to 30.) He said the question was talked around generally and passed upon by the trustees at the meeting of the Board of Trustees, and to the question: "What action did the board take on it?" he said, "It was approved."

Q. Nobody protested against it?

A. Nobody protested whatever.

Q. Unanimous? A. Unanimous.

To the question whether Mr. Denman, a member of the board at that time, approved it, he said: "He did not disapprove it. There was no protest made from anybody. Yes, Mr. Denman joined with the others in definite approval."

Q. That occurred in 1912?

A. Well, I left the company's employ I think it was February, I am sure it was February, 1913, to go back to Boston, to carry on the work I ac-

(Testimony of A. W. Sterrett.)

cepted there, and I believe I arrived there in March. I cannot remember of having attended any directors' meetings in 1913. I have not looked it up in the record or anything but I remember I was away early in the year, I went away on a little vacation, and left shortly after I came back. (Transcript, pp. 176, 177 top.)

Q. During the time you were on the board of trustees, was the auditor's report taken up at each meeting? [187]

A. Yes, the auditor's reports were always taken up.

Q. I mean by the expert accountant, the certified accountant?

A. Yes, Mr. Moorhous's reports were always brought in.

Q. What about the supplemental report of Mr. Denman, was that taken up at the meetings?

A. That was always attached. I remember seeing the supplemental report.

Q. Were they discussed in the board of trustees' meetings?

A. All of those reports were discussed.

Q. Were they approved by the trustees?

A. Always approved.

Q. Mr. Denman voting for it?

A. Mr. Denman always approved of everything.

Q. This was done at regular meetings of the board?

A. All done at regular meetings. (Transcript p. 177, Ll. 3 to 20.)

(Testimony of A. W. Sterrett.)

On cross-examination he testified:

Q. Now, this resolution that you speak of, do you recall whether it was formally put and resolution adopted?

A. Why, it is usually done that way. I cannot recall the details, I do remember the incident so well because of the canny way the stockholders put it.

To the question: "You know this resolution was put in a formal way, could you swear that was true?" he said, "I believe it was true."

Q. You believe it was? A. Yes.

Q. In the form of a resolution?

A. I particularly remember everything was freely discussed. (Transcript, p. 178, Ll. 1 to 12.)

He said he could not tell why the resolution was not [188] put in the minutes and that he could not recall who was secretary of the company at that time but it was either Mr. Denman or Mr. Albertson, he thought it was Mr. Denman, and to the best of his recollection the trustees present at the time the resolution was adopted were Mr. Davis, Mr. Denman, Mr. Bryant and himself but he could not remember who put the resolution and who seconded it.

Q. You do not remember voting on it at the time?

A. Oh, yes, I remember all these things were approved. (Transcript, pp. 178 bottom, 179 top.)

On recross-examination Mr. Sterrett testified that he was superintendent of the company from its be-

(Testimony of Rufus Davis.)
ginning and all of the time he was connected with the company he was employed by Mr. Rishardson. (Transcript, pp. 179, 180.)

Testimony of Rufus Davis, for Defendant.

RUFUS DAVIS, a witness called by the defendant, being duly sworn, testified in part as follows:

That he was connected with the company from June 1, 1900, to this date. (Transcript, p. 180, L. 25.)

Testimony of L. R. Manning, for Defendant.

L. R. MANNING, a witness called by the defendant, being duly sworn, testified as follows:

That he had lived in Tacoma for thirty-five years and was in the banking business until 1898 and since then had been in the real estate and loan business, and counsel for defendant then asked him the following question:

"Q. Assume that those assets consisted of $1,500,000; that those assets consisted in part of $150,000 Canadian bonds, $50,000 of Canadian script, $64,000 or something like that of liberty bonds, about $96,000 in case, in August, 1918, and that the balance of the assets consisted of [189] about $200,000 in bills receivable, and a lot of personal and real property in the province of Alberta, consisting of farms and farming equipment, 5,000 head of cattle and leases upon which the cattle were grazing, about 250 head of horses and other properties of minor character, but in the aggregate con-

(Testimony of L. R. Manning.)

sisting of about $1,300,000; in cash, bonds, liberty bonds and Canadian bonds, $300,000,—taking those things into consideration, what in your judgment would be a fair compensation to be paid to a man for converting the assets into money, selling off the real estate and personal property, winding up the affairs, and distributing the proceeds to the stockholders, assuming at the same time that the party who agreed to do this would not engage in any other business that would interfere with the liquidation of the company and that he was to pay all attorney's fees except the commissions on the sale of the "Elihu Thomson," a steamboat, and services for a time, of D. A. Moore and R. J. Davis, and that anything beyond a reasonable time on their part should be borne by him out of his individual funds as well as expenses, what in your judgment, under these circumstances, and these assumptions, would you say it would be reasonably worth to liquidate this company?" (Transcript, pp. 181, 182.)

"Mr. FISHBURNE.—I desire to interpose an objection there. I object on the ground that it is incompetent, irrelevant and immaterial, because what was the reasonable value of these services would not be admissible under the law, and on the further ground that it is not proper expert testimony. The jury is just as capable of passing on this as the witness himself. It is relative to a time, part of [190] which the defendant was under salary. We object on the further ground that it is

(Testimony of L. R. Manning.)

inconsistent with their contention that he was authorized by a resolution.

Mr. McCORD.—And assuming further that the party who was to do this liquidation and sell these assets was also drawing a salary of $12,000 during the summer of 1918 and up to September 30, 1918. With that modification, I will renew the question.

Mr. FISHBURNE.—I will renew the objection.

The COURT.—Yes, let the same objection to the question as modified and the objection will be overruled and exception noted.

Q. Now, go ahead.

A. I should think 10 per cent would be a reasonable commission. (Transcript, pp. 181, 182, 183.)

Testimony of Chester Thorne, for Defendant.

CHESTER THORNE, witness called by the defendant, being duly sworn, testified as follows:

That he lived in Tacoma since 1890 and had been engaged principally in the banking business, first with the National Bank of Commerce and now with the National Bank of Tacoma, its successor, and that he was president of the board and Mr. McCord asked him the same question as he asked Mr. Manning and Mr. Fishburne interposed the same objection as he had made to the former question and the Court overruled his objection and allowed him an exception. The witness answered that he thought ten per cent would be very reasonable compensation for Mr. Richardson's services, that is ten per cent of $1,300,000. (Transcript, pp. 184, 185.)

Testimony of Eugene Wilson, for Defendant.

EUGENE WILSON, a witness called by the defendant, being [191] duly sworn, testified as follows:

That he has been engaged in the banking business in Tacoma for the last twelve years, first with the Bank of Commerce and then with the National Bank of Tacoma as vice-president, and that he was vice-president now. Mr. McCord propounded to him the same question he had asked Mr. Manning, Mr. Fishburne interposed the same objection and the Court allowed him an exception. Mr. Wilson said he was thoroughly familiar with all the work connected with the liquidation of the Pacific Cold Storage Company and he thought from eight to ten per cent would be reasonable for it. (Transcript, pp. 185, 186, 187.)

On cross-examination Mr. Wilson testified that Mr. Richardson was one of the trustees or directors of the National Bank of Tacoma and had been a director long before Mr. Wilson came there and still was a director. (Transcript, p. 187 bottom.)

Testimony of Rufus Davis, for Defendant (Recalled).

RUFUS DAVIS then resumed his testimony and among other things testified as follows:

That he closed the Alberta negotiations (Transcript, pp. 189, 190 top), and that everything he did from the date he was employed to this date by

(Testimony of Rufus Davis.)

the Pacific Cold Storage Company was under instructions of the president, Mr. Richardson.

Q. Did Mr. Richardson take any active concern in the disposition of these assets in Alberta?

A. He did, just as he had in the whole of the business from its inception.

Q. In other words, Mr. Richardson dominated anything he came in contact with, did he?

A. Well, if you want to express it that way. I would say Mr. Richardson took an active interest in all the business of [192] the Pacific Cold Storage Company, that he discussed the affairs of the Pacific Cold Storage Company, and after getting all the information he could from employees and other sources, he decided what was best to do, and Mr. Richardson's judgment finally controlled the policies of the company in the last analysis.

Counsel asked the question: "Does that apply in the disposition of the assets as well as in the previous management of the company?" and the witness said: "Yes." (Transcript, p. 190.)

The witness testified that the head office of the Pacific Cold Storage Company was at Tacoma, Washington, and that it had branches at Fairbanks, Nome, Fort Gibbon, Dawson, Ruby, St. Michael, Iditarod, Gleichen and Glasgow office, 26 Bothwell Street.

The witness further testified that he went to Alberta for the purposes of carrying out Mr. Richardson's instructions to dispose of that property first in 1917 and under his instructions made some pro-

(Testimony of Rufus Davis.)

gress. "In June, 1918, I again went to Alberta, where I can say that the principal part of the disposition of the assets took place." He testified that the various properties in Alberta were sold in 1917 and on or before August, 1918, but that the purchase price of these assets were not cash at the time the sales were made and were not for many months thereafter (Transcript, pp. 192, 193, 194, 195). Referring to the balances due for the Alberta property, counsel for defendant said:

Q. Were those accounts what you would call bankable paper which would be readily discounted or which you would have to work off the best you could, and to sell the securities?

A. I do not think you could sell that paper to a commercial [193] house, no, but you had to find customers for it.

Q. It was not bankable paper, was it?

A. No, I do not think it was. If I remember, we circulized our shareholders. They were all interested in getting this property into cash, and I am sure some of them were connected with banks and none of them ever said their banks would take the paper.

Q. Did you know about the Waechter notes? Did you consider those bankable paper or did you not?

A. I suppose the Waechter notes were good papers or we would not have taken them.

Q. What is that?

(Testimony of Rufus Davis.)

A. I supposed the Waechter notes were good and would at some time be paid or we would not have taken them, but I do not think I could have taken them to any bank in the State of Washington.

Q. Could not negotiate it at the bank?

A. I do not think I could have done so. (Transcript, pp. 195, 196.)

Q. Knowing the value of those assets as you did, what do you consider as to liquidation and sale, was it a good liquidation and sale, or was it a poor one?

Mr. Fishburne objected to the question as incompetent, irrelevant and immaterial and the Court allowed the witness to answer and he said, "I think it was an exceedingly good liquidation." (Transcript, p. 196 bottom.) He said he was a trustee in 1912 and that he could not say whether the correspondence between the advisory board and Mr. Richardson relative to increase of salary to Richardson was admitted to the board at any regular meeting at which he was present. (Transcript, p. 197.) [194]

Q. Do you recall whether the board ever adopted or approved at any regular meeting, this arrangement with Mr. Richardson as to the 2½ per cent commission?

A. I could not say whether there was any formal action on that proposition or not.

Q. Do you know whether it was brought up at any meetings of the trustees and discussed?

(Testimony of Rufus Davis.)

A. Well, the reports containing the statements were brought up annually and discussed.

The witness further said that the board approved the reports as submitted.

Q. That is you refer now to the accountant's report, Denman's supplemental report? A. Yes.

Q. What do you recall about whether any formal resolution was introduced or not, or was the matter brought up and discussed and the understanding was that it was agreeable, something of that sort,—how was that, do you recall?

A. I know that under some circumstances a resolution was offered to that effect and seconded and voted upon.

Q. By Mr. Denman, wasn't it, in one instance?

A. Yes. Well, I did not know about that. We had here in the minutes yesterday, one instance where I made a motion and Mr. Denman seconded the motion. (Transcript, pp. 199, 200 top.)

Counsel referring to the meeting of the stockholders of May 31, 1918, said: "Now, after that meeting (meaning the stockholders' meeting) were any resolutions introduced that you remember, agreeing with and authorizing the payment of this commission of five per cent to Mr. Richardson?"

A. I do not know, I cannot recall. [195]

Q. Was the matter discussed at that meeting?

A. Yes, it was discussed at that meeting.

Q. And at that meeting was there any disapproval of it or any approval of it one way or the other,—just what your recollection is?

(Testimony of Rufus Davis.)

A. Well, that matter was up several times and I do not remember any disapproval of it.

Q. You do not recollect whether there was a formal resolution introduced at that time or not?

A. No, I do not.

Mr. Fishburne moved to strike all the testimony relating to the five per cent commission on the ground that it was not proper under the ruling and law relative to how trustees shall perform their duties or make a contract of that sort, and the Court overruled the objection, and the witness then testified that the matter as to the five per cent commission was drawn to the board of trustees at that time "and my recollection is that no action was taken, because even as late as 1918 we did not care for advertising the fact that we were converting the assets of the company into cash and expected to retire from the business."

Q. That is, no written action was taken?

A. No.

Q. Well, was there any action taken in the way of a passage of a resolution and not spread upon the minutes any action,—it does not have to be spread upon the minutes to be a valid action,—but I want to know whether the board acted upon this matter and approved the payment of the 5 per cent commission to Mr. Richardson?

A. I could not say just exactly what action was taken but it [196] was understood that was my,—

At this point Mr. Fishburne moved that what he

(Testimony of Rufus Davis.)

understood be stricken and it was so ordered by the Court.

Q. Why do you say it was understood if it was not. Just go ahead and tell what was done in reference to the approval of this suggestion that Mr. Richardson be paid five per cent.

A. I recall that the matter was discussed at that time and agreed to and I think I know too why it was not put on the minutes, and I do not want to swear to that, I cannot recall that.

Q. You know that action was taken but you would not swear why it was not put on the minutes?

A. No. (Transcript, pp. 202, 203.)

He said he voted for the five per cent commission and to the question whether he considered that sum reasonable Mr. Fishburne objected as incompetent, irrelevant and immaterial on the grounds already stated and the Court overruled the objection and allowed him an exception, and the witness then answered that he considered the compensation reasonable or he would not have voted for it. (Transcript, p. 204.)

The witness RUFUS DAVIS testified that he was connected with the Pacific Cold Storage Company during its entire existence, from June 1, 1900, to the present time, occupying various positions as branch manager at Dawson, to vice-president. (Trans. 180.)

Q. What did the company finally have in Alberta?

A. They had two ranches that they owned in fee simple and a lease on Government land for pasture

(Testimony of Rufus Davis.)

purposes. They had 5,000 head of cattle approximately, 250 50 300 head of horses. They had [197] branch markets at Gleichen, Benalto and Brooks and were engaged in a general farming and marketing business supplying from Alberta, the branches at Dawson and at times all the other northern branches of the company. At the beginning of the war, when the cry came for wheat for the world, they branched out into a wheat farm, and the first year they raised 15,000 bushels of wheat and the next year about 20,000 bushels of wheat and continued their livestock business, until under instructions to turn the assets of the company into cash, we were instructed to sell and finally did sell, all of their property in that province.

Q. "Were you there when the properties were sold? A. I was.

Q. "You closed the negotiations, did you?

A. "I did.

Q. "I will ask you under whose instructions you liquidated or sold those assets?

A. "Everything I did from the date I was employed to this date, by the Pacific Cold Storage Company, was under instructions of the president, Mr. Richardson.

Q. "Did Mr. Richardson take any active concern in the disposition of these assets in Alberta?

A. "He did, just as he had in the whole business from its inception.

(Testimony of Rufus Davis.)

Q. "In other words, Mr. Richardson dominated anything he came in contact with, did he?

A. "Well, if you want to express it that way.

Q. "Well, how would you express it?

A. "Well, I would say that Mr. Richardson took an active interest in all of the business of the Pacific Cold Storage Company, that he discussed the affairs of the Pacific Cold Storage Company, and after getting all the information he could from employees and other sources, he decided what was best to do.

Q. "And whose judgment finally controlled the policies of the company? A. Mr. Richardson's. [198]

Q. "In the last analysis?

A. "Mr. Richardson.

Q. "Always,—I mean by that, does that apply in the disposition of the assets as well as in the previous management of the company?

A. "Why, yes.

Q. "Where did this company have offices?

A. "The head office of the Pacific Cold Storage Company was at Tacoma, Washington. There were branch offices at Dawson, Fairbanks, Ruby, Iditerod, St. Michaels, Nome, Gleichen and an office in Glasgow, Scotland.

Q. "Now, when did you go, if at all, to Alberta, for the purpose of carrying out Mr. Richardson's instructions to dispose of that property?

A. "I went first to Alberta in 1917 for that purpose, and under his instructions made some progress. In June, 1918, I again went to Alberta

(Testimony of Rufus Davis.)

where I can say that the principal part of the disposition of the assets took place.

Q. "Were they sold out in 1918, all of the assets in Alberta? A. In 1918?

Q. "Yes.

A. "No, not all of the assets in Alberta in 1918.

Q. "What was sold in 1918 and what later?

A. "Well, in the conversion of property into cash, there are sometimes more than one step to be taken. You can sell it for cash, or you can sell it for part cash and part notes or other collateral, or on even a straight book account. Now the South ranch, as it was termed, in Alberta, was sold to Chris Bartsch.

Q. "What was sold?

A. "In 1917 the equipment of that ranch was sold for the sum of $60,000, but we did not get $60,000 in cash. I cannot perhaps detail all the arrangement but we got some cash at that time, [199] and some cash, I think $10,000 was to be paid in 1918, and the balance of $30,000 was to be placed on mortgage and $10,000 of that was to be paid in about a year, and the balance in, if I remember, ten equal annual payments. Now, it became necessary to dispose of that mortgage and that mortgage we did not succeed in converting into cash until 1919. Now, we sold the North ranch and some cattle and some horses, some equipment and other livestock to John C. Norton."

That later on other trades were made and finally the property was sold, part for cash and part by

(Testimony of Rufus Davis.)

mortgage running for a period of five years. (Trans. 193.)

Q. "Then the divers payments on the sale of those assets in Alberta were not cash at the time the sales were made, and were not for many months thereafter, were they?

A. "Just as I stated. [200]

Q. "That is true of the Bartsch notes, too, wasn't it?

A. "The Bartsch paper would not be bankable paper at all.

Q. "Now, did you have anything to do with the disposition of any other property in the liquidation process so far as you recall?

A. "No, except perhaps to assist in the sale of this property here in Tacoma.

Q. "That was sold to whom?

A. "Mr. Richardson sold that to Mr. Huck of the North Pacific Sea Products Company.

Q. "Knowing the value of those assets as you did, what do you consider as to the liquidation and sale, was it a good liquidation and sale, or was it a poor one?"

Mr. Fishburne objected to the question as incompetent, irrelevant and immaterial.

A. "Well, I may be prejudiced, but of course I think that,—it was an exceedingly good liquidation. I do not think there had been a day since we started on that liquidation we could have gotten as much money for the assets as we got at that time. I think there was both energy and brains

(Testimony of Rufus Davis.)

put into it, and that in addition to that, there was considerable good fortune coming our way.

Q. "Well, what have you to say as to Mr. Richardson's connection with it?

A. "He put his time and usual energy into the matter of liquidating the assets, and did his work as speedily as possible and got every cent there was in it.

Q. "The time at which it was sold was a fortunate item? A. I think so.

Q. "And who selected that time?

A. "I think Mr. Richardson did.

Q. "Now were you a trustee of the Pacific Cold Storage Company? A. I was for a time.

Q. "How long a time?

A. "I do not know when I first was elected as a trustee, but it runs back as far as 1910." [201]

Q. Do you recall the correspondence between the advisory board and Mr. Richardson relative to the increase of salary to Richardson?

A. I know there was such correspondence.

Q. Was that correspondence admitted to the board at any regular meeting at which you were present?

A. I could not say whether the correspondence itself was or not.

Q. Well, was the substance of it brought before the board meeting to your recollection of the matter?

A. My recollection is Mr. Denman first mentioned to me the matter of the additional compensation to

(Testimony of Rufus Davis.)

Mr. Richardson in 1911 or '12 and he showed me at that time how he intended to set that out in his supplemental report, and everybody knew all about the matter. I cannot recall now any particulars as to just what was said and done, but I know that the compensation was set out in the supplementary report or supplemental report at that time, and that Mr. Bryant, who was a director, and Mr. Cox —I do not know whether Mr. Cox was a director at that time or not, but he was just as familiar with the affairs of the company as he was afterwards when he was a director, and Mr. Denman and I and Mr. Richardson and Mr. Sterrett all knew exactly on what basis Mr. Richardson drew salary including this 2½ per cent. For myself it was my habit to go over these annual reports very carefully and I frequently discussed the matter of the 2½ per cent compensation with Mr. Denman, who was the auditor of the company at that time, and he never made any objection to it.

Q. Do you recall whether the board ever adopted or approved at any regular meeting, this arrangement with Mr. Richardson as to his 2½ per cent commission?

A. I could not say whether there was any formal action on that proposition or not.

Q. Do you know whether it was brought up at any meetings of the trustees and discussed?

A. Well, the reports containing the statements were brought up annually and discussed.

(Testimony of Rufus Davis.)

Q. What action did the board take on them annually?

A. They approved the reports as submitted.

Q. That is you refer now to the accountant's report? Denman's supplemental report? [202]

A. "Yes.

Q. "Those different accounts year by year were approved by the directors? A. Yes.

Q. "At regular meetings? A. Yes.

Q. "What do you recall about whether any formal resolution was introduced or not, or was the matter brought up and discussed and the understanding was that it was agreeable, something of that sort,—how was that, do you recall?

A. "I know that under some circumstances a resolution was offered to that effect and seconded and voted upon.

Q. "By Mr. Denman, wasn't it, in one instance?

A. "Yes, well, I did not know about that. We had here in the minutes yesterday, one instance where I made a motion and Mr. Denman seconded the motion.

Q. "That is, approving the payments?

A. "To approve the report as submitted, the annual report.

Q. "The annual reports did not show payment to Mr. Richardson of his salary, did they?

A. "Surely.

Q. "And that was approved each year?

A. "Yes, sir.

(Testimony of Rufus Davis.)

Q. "I mean each year at a meeting of the trustees as well as stockholders?

A. "Of the trustees, yes.

Q. "Sometimes by the stockholders, too, wasn't, or do you recall?

A. "No, I do not know positively as to that. We usually had a short stockholders' meeting and then immediately afterwards we had the trustees' meetings.

Q. "Run them right close together?

A. "Well, not even a five minutes recess. [203]

Q. "Did you attend the stockholders' meeting of May 31, 1918? A. I did.

Q. "Were you elected a trustee at that time?

A. "I was.

Q. "Did you qualify immediately afterwards?

A. "Yes.

Q. "You held your meeting that year just after the adjournment of the stockholders' meeting?

A. "Yes.

Q. "I will ask you whether at that time there was brought before the board, this proposition of Richardson to liquidate the company and receive the compensation of five per cent for doing so, do you recall that? A. Yes.

Q. "You recall attending that meeting?

A. "Yes.

Q. "Who was present?

A. "Charles Richardson, Ralph Stacy, F. L. Denman—

Q. "Who?

(Testimony of Rufus Davis.)

A. "I think F. L. Denman was there.

Q. "He was not a trustee?

A. "1918, wasn't this?

Q. "Yes.

A. "I think he was at the shareholders' meeting May 31, 1918.

Q. "Well, whether he was a director or not makes no difference. Who else was there? Was Mr. Miller there?

A. "Mr. Miller was there, I am pretty sure Mr. Miller was there at the stockholders' meeting in 1918 and I presume he was at the directors' meeting. I would not want to swear to that.

Q. "Was Mr. Moore there?

A. "B. A. Moore was there, yes, B. A. Moore was there.

Q. "Now, after that meeting, were any resolutions introduced that you remember, agreeing with and authorizing the payment [204] of this commission of five per cent to Mr. Richardson?

A. I do not know, I cannot recall.

Q. Was the matter discussed at that meeting?

A. Yes, it was discussed at that meeting.

Q. And at that meeting was there any disapproval of it or any approval of it one way or the other,—just what is your recollection?

A. Well that matter was up several times and I do not remember any disapproval of it.

Q. You do not recollect whether there was a formal resolution introduced at that time or not?

A. No, I do not.

(Testimony of Rufus Davis.)

Q. But it was the consensus of the meeting as expressed by them that it was satisfactory?

Mr. FISHBURNE.—We object to that as incompetent, irrelevant and immaterial, move to strike all the testimony relative to it on the ground it is not proper under the ruling and law relative to how trustees shall perform their duties or make a contract of that sort.

The COURT.—Objection overruled. Question is what was done at that time.

Q. Go ahead and tell what was done.

A. The matter was drawn to the board of trustees at that time and my recollection is that no action was taken, because even as late as 1918 we did not care for advertising the fact that we were converting the assets of the company into cash and expected to retire from business.

Q. That is no written action was taken?

A. No.

Q. Well, was there any action taken in the way of a passage of a resolution and not spread upon the minutes any action,—it does not have to be spread upon the minutes to be a valid action, but I want to know whether the board acted upon this matter and approved the payment of the 5 per cent commission to Mr. Richardson.

A. I could not say just exactly what action was taken, but it was understood—

Mr. FISHBURNE.—Now may it please the Court I move that what he understood be stricken.

(Testimony of Rufus Davis.)

The COURT.—Yes, what he understood will be stricken.

Q. Why do you say it was understood if it was not. Just go ahead and tell what was done in reference to the approval of this suggestion that Mr. Richardson be paid five per cent. [205]

A. I recall that the matter was discussed at that time and agreed to, and I think I know too, why it was not put on the minutes and I do not want to swear to that, I cannot recall that.

Q. You know what action was taken but you would not swear why it was not put on the minutes?

A. No.

The witness stated that shortly after this meeting he went to Dawson, Alaska, or Alberta and returned in December and was present at the meeting on January 7, 1919. (Trans. 186–199.)

Testimony of Ralph F. Stacy, for Defendant.

RALPH F. STACY, a witness called by the defendant, testified in part as follows:

That he for seven years and seven months was president of the National Bank of Tacoma in Tacoma, Washington, and knew Mr. Richardson. Mr. McCord asked what in his judgment was the service worth at that time for winding up the Pacific Cold Storage Company and whether five per cent was reasonable or unreasonable, and Mr. Fishburne made the same objection as to the question to Mr. Manning, the Court made the same ruling and allowed him an exception, and the witness stated that

(Testimony of Ralph F. Stacy.)

he voted for the resolution because he thought the five per cent was reasonable. (Transcript, pp. 205–207.)

Q. You recall the telegram from Inglis approving the proposition of paying Richardson five per cent? A. I do. [206]

Q. That you knew of, did you, prior to the meeting in January?

A. I will not say how long, but some weeks at least.

Q. You do not recall whether after the receipt of the telegram by Mr. Richardson along about the middle of August, 1918, whether you had a meeting or not? A. No, I do not. (Transcript, p. 208.)

Ralph S. Stacy testified that he was one of the trustees of the Pacific Cold Storage Company in 1918 and was one of the trustees upon the dissolution of the company, that he voted for the resolution of January 7, 1919, approving the payment of five per cent commission to Mr. Richardson. He states, over the objection made by Mr. Fishburne and exception allowed by the Court:

I voted for it because I thought it was reasonable and I thought it was reasonable for two distinct reasons. I had been for many years up to then and since, familiar with the liquidating of various concerns. Any concern that can pay all of its debts and pay over 100 per cent on the dollar, is certainly worth five per cent to liquidate. Furthermore, I had personal reasons for thinking it was all right. I had some stock which I bought in

(Testimony of Ralph F. Stacy.)

1915 at 72 cents on the dollar. That stock eventually brought me 105, approximately $33 per share, almost fifty per cent. In addition it has brought me regularly dividends for three years of ten per cent or more. Any man that will pay me fifty per cent in that length of time is certainly entitled to five per cent. Those are the two reasons why I voted for that resolution at that time.

Q. Thought it was worth it?

A. I thought it was worth it and I was glad to do it.

The witness stated that he was familiar with [207] Mr. Richardson in Tacoma and was the President of the National Bank of Tacoma and that his office was in the same building in 1918, as the office of the Pacific Cold Storage Company.

Q. "During the summer of 1918, and prior to this time in January, 1919, I will ask you whether you recall ever attending meetings, without fixing the time?

A. "I know I attended some, but I do not know how many.

Q. "You know you attended some?

A. "Yes.

Q. "Now, I will ask you at the time you attended these other meetings, you had heard of this correspondence between Richardson and the advisory board in reference to the settlement? A. Yes.

A. "I had heard of it, it was talked over.

Q. "You talked it over? A. Yes.

Q. "You recall the telegram from Inglis approv-

(Testimony of Ralph F. Stacy.)

ing the proposition of paying Richardson five per cent? A. I do.

Q. "That you knew of, did you, prior to the meeting in January?

A. "I will not say how long, but some weeks at least.

Q. "You do not recall whether after the receipt of the telegram by Mr. Richardson, along about the middle of August, 1918, whether you had a meeting or not? A. No, I do not.

Q. "You did have some meetings?

A. "We had met at regular intervals at the call of the president, and this particular matter was discussed by the directors.

Q. "Was discussed? A. Yes.

Q. "Do you recall what action was taken on it?

A. "I do not know whether there was any formal action or not, I know that no director present objection. [208]

Q. "What is that?

A. "No director presented objection. Like myself, they thought it was reasonable.

Q. "And all of them expressed themselves as favorable to it? A. Yes.

Q. "And that was before this formal resolution was entered on the books in January?

A. "Oh, yes.

Q. "Some time before? You cannot tell when?

A. "Some time but I cannot tell how long.

Q. As a matter of fact, at the meetings, whatever the date, before this formal meeting was held,

(Testimony of Ralph F. Stacy.)
the matter was discussed and everybody signified their approval of the plan, did they?

A. "To the best of my recollection, yes, sir."

On cross-examination the witness stated:

Q. "Isn't it a fact that, in the summer of 1920 you stated to Mr. Denman that you had never heard of this 5 per cent?

A. "It is absolutely not a fact." (Trans. 205–210.) [209]

Instructions of Court to the Jury.

Gentlemen of the Jury:

The plaintiff alleges in four different causes of action that the defendant is indebted to him in the sum of money which is set out in the seventh amended complaint. The pleadings are the seventh amended complaint and the amended answer, which will be sent to the jury-room. They are not to be considered as evidence in the case. You can read the pleadings to determine what is the claim on the part of the plaintiff and what is the claim of the defendant.

The plaintiff sets forth four claims; and you are instructed that where an admission is made by the answer no proof needs to be presented to establish that fact by the plaintiff, and where a denial is made the fact must be found from the evidence which is presented, and where the defendant says he has neither knowledge nor information on which to form a belief as to the allegations of the com-

plaint that under the law of this state amounts to a denial.

I will state to you briefly what the claims are. The plaintiff claims that in 1897, the Pacific Cold Storage Company was a corporation doing business in Tacoma; that it ceased to do business on the 31st of May, 1918, and was dissolved and order entered June 2, 1919; and that before the order of dissolution was entered all of its debts were paid; that the corporation had capital stock of a million dollars divided into ten thousand shares of one hundred dollars each [210] and that plaintiff was the owner of 60 shares; that during the life of the corporation it made profits and dividends were declared in such sums as were proper; that the defendant between the years 1912 and 1918 while acting as trustee and president, without authority, wrongfully appropriated from the earnings of the company $18,000; that the total dividends earned during that time was $720,000; that the plaintiff was entitled out of those earnings or profits to $108.00 on his 60 shares of stock; that he has asked the defendant to pay the same, which the defendant has refused.

In the second cause of action he says one Charles A. Miller owned 798 shares of stock of this corporation, and sets out the same allegation in relation to the Miller stock as he did in relation to his own, and says that there accrued to the Miller stock $1,436.40 on account of this two and a half per cent; that since the commencement of this action Miller sold to the plaintiff all of his shares of

stock. He sets out the dates of ownership and the value of the shares of Miller and then says demand was made on defendant for the amount named, which has been refused.

The third cause of action sets forth the same facts in relation to the organization, stock ownership and capital stock, and says that upon the dissolution of the corporation of the capital stock return the defendant Charles Richardson appropriated certain sums of money, and of that particular appropriation made of the capital stock return, the amount due to the plaintiff for his 60 shares was $315.00, and that the amount due upon the capital return of the Miller stock taken by [211] the defendant was something over $4,000, and that the total amount which he is claiming judgment is $6048.90, with interest at six per cent per annum on $1544.40 from the 31st day of May, 1918, and on $4504.50 from the 31st of January, 1920.

Defendant answering the allegations of plaintiff admits it was a corporation doing business in Tacoma, had a capital stock of $1,000,000; admits the plaintiff was the owner of 60 shares of the capital stock and also admits the defendant was trustee and president of the corporation; admits that dividends were declared of approximately $720,000, admits that he refused to pay plaintiff the sum of $108.00; admits that Miller owned 798 shares of the capital stock of said corporation; admits the order of dissolution was entered on the 7th of June, and denies every other allegation in the several counts in the complaint.

Defendant then further answers and says that a large number, more than 90 per cent of the capital stock of the corporation was held by residents of Great Britian long prior to June 1, 1911, and to the date of the dissolution, and that those stockholders in Great Britian appointed among themselves an advisory committee to determine the policy and business management of the corporation, and that this advisory committee was approved by the board of trustees and stockholders at annual meetings held in the City of Tacoma; that this advisory committee was by consent of each and all of the stockholders verbally clothed with power to determine the policy subject to be approved by the board of trustees, and that such action by the board of trustees was taken at [212] the annual meeting of the stockholders and at the first meeting of the board of trustees after each stockholders' meeting, but that those proceedings were not recorded in the minutes; that the defendant as *present* of the board of trustees had communicated with the advisory board through correspondence which has been submitted to the plaintiff; that from the year 1901 until the date of dissolution the defendant was president and member of the board of trustees and had active charge and management of the corporation and performed the duties prescribed by the by-laws; that prior to January 1, 1911, he received a salary of $1,000.00 a month; that on or about the 14th day of December, 1910, he communicated with the advisory committee on the question of additional compensation and the advisory

committee agreed that he should receive 2½ per cent of the total amount of dividends paid by the corporation each year; that he accepted this proposal and that this proposal was submitted to the board of trustees and was by the board of trustees at their several annual meetings approved, but no minutes appeared upon the minute-book, but such resolution was adopted by the unanimous vote of the trustees at such meetings verbally; that this arrangement continued from January 1, 1911 to December 31, 1917, and that this 2½ per cent of dividends declared was paid to the defendant when the dividends were paid to the stockholders; that all dividends declared by the corporation were paid by the corporation to the shareholders, and that the 2½ per cent was deducted from the gross earnings of the corporation and not from any of the declared dividends of the stockholders; that at the time that the arrangements for this additional compensation was made and all [213] of the time from the 1st day of June, 1910, to the 1st day of June, 1918, the plaintiff was secretary and auditor of the corporation and made all vouchers explanatory of all disbursements; that the explanation upon the vouchers for such additional compensation was: "Extra on 2½ per cent of total dividend as per order on file"; that each year the account books of the corporation were audited and a report of such audit was made and that in such audits so annually made the 2½ per cent additional compensation was included and explained; that such audits were submitted to the advisory board

and to the annual meeting of the board of trustees and were approved by the board of trustees, and that checks were drawn by the corporation in payment of such additional compensation; that during a portion of the time the plaintiff was a trustee; that on January 13, 1912, the defendant wrote a letter to the plaintiff as auditor of the corporation saying that by virtue of a resolution passed by the advisory board he was given 2½ per cent on account of all dividends additional to salary; that checks would be issued for this amount, and that each year thereafter the plaintiff issued checks to the defendant for the several amounts where are set out in that count; that these amounts were entered in the annual reports, and that these payments were pursuant to authority and approval of the trustees. And defendant further says about two years prior to the 31st of May, 1918, he submitted to the advisory board a suggestion for liquidating the corporation and suggested to them the advisability of paying to the defendant a commission for services in liquidating the corporation instead of a salary and it was agreed that he should receive five per cent of the liquidated assets of the corporation, and [214] this was approved by the board of trustees and stockholders; and that he entered upon the discharge of his duty and carried it out under the direction of the advisory board and the board of trustees of the corporation and made a total distribution of $1,050,000 to the stockholders, and that his compensation for the service was allowed by the advisory committee and board of trustees of

the corporation and that the payment of such compensation was subsequently ratified by the board of trustees and the stockholders. Defendant further answers that the services which he rendered were outside the scope of his duties as president and trustee, and that the amounts which were paid to him were the reasonable value of the services rendered; and that the plaintiff, by reason of what he did and by reason of the acts of Miller with relation to the conduct of the business and his succeeding to the Miller stock, is estopped from contending that the compensation paid to the defendant under the circumstances was unauthorized; and further says that all the amounts claimed by the claimant on the first cause of action, except as to the payments in January, 1917, and 1918, are barred by the statute of limitations and cannot be recovered; and further says that any recovery sought for anything due on the Miller stock cannot be allowed, he having seconded the motion to allow the five per cent commission and having voted in favor of it.

You are instructed, gentlemen of the jury, that the plaintiff has filed a reply in which he denies the affirmative matter set forth in the answer of the defendant. [215]

You are instructed that the burden of proof in this case rests upon the plaintiff to establish the facts set forth which are denied; then the burden shifts to the defendant to show the facts as are contended for by him in his answer, and this must be done by a fair preponderance of the evidence.

By fair preponderance I do not mean the greater number of witnesses testifying to any fact or state of facts, but the greater weight of testimony. The testimony of one witness sometimes outweighs the testimony of many witnesses. In considering the weight of the testimony of the witnesses who appeared before you, you will take into consideration the documents and exhibits that have been presented, the documentary evidence,—reports and letters and all of the memoranda which the court permitted to be read to you and which has been filed, and lots that have not been read; and you will consider fairly this entire issue. You are the sole judges of the facts and you must determine what they are. Give each of these parties a square deal and concentrate your minds solely upon this issue here eliminating everything else. You are likewise the sole judges of the credibility of the witnesses, and in determining the weight and credit that will attach to the testimony of any witness you will take into consideration his demeanor upon the stand, the fairness of his testimony, his interest or lack of interest in the result of this controversy, the reasonableness of his story, and from all the circumstances surrounding the case, determine where the weight of the evidence is, and if you believe any witness has wilfully testified falsely to any material fact [216] in this case you will disregard the testimony of that witness entirely except in so far as it may be corroborated by other credible evidence or circumstances developed upon the trial of the case. In determining the testimony

in this case and the fact which is in issue here, if it is apparent or may be apparent to you in the trial of this case that there was any witness who was available who knows about the facts and who was not called to be a witness by the party who contended his testimony to be in his favor, you would have a right to conclude that the testimony of that witness, if he had not been called, would be against the party who should have called him, if he was available.

You are instructed as a general proposition of law when by-laws are adopted by a corporation that the conduct of the business of the corporation should be in accordance with the by-laws, and when the by-laws provide that compensation shall be fixed by the board of trustees then no compensation can be fixed except as is provided by the by-laws. This provision of the by-laws and of the law is for the purpose of protecting creditors and stockholders without notice. A stockholder has always the privilege of inspection of the books and records of the corporation, and the provision is so that the stockholder knows upon examination of the records that they disclose exactly what the status of the corporation is and that the creditor of the corporation likewise may be advised as to what the expenses of the corporation are. This iron-clad proposition, however, with relation to by-laws and fixing compensation is not construed in the same strict manner with stockholders who have notice The purpose of the by-laws [217] and purpose of the minutes is to give notice to everybody who

is entitled to it, and when a stockholder has notice of the business of the corporation then he is fully advised just the same as though the record had been made. I advise you in relation to that fact in view of what has been said in the argument and in the admissions of the testimony here, so that you will be advised fully, more fully with relation to the status of the several parties in this case.

Likewise, gentlemen of the jury, as I have heretofore held, as in the law, the stockholders of a corporation have a right to expect from their directors a conscientious consideration of every proposition which is presented, and which involves any interest of the company, and such consideration must be given and action taken in formal meetings. The directors have no power to act as such individually, nor can they delegate the powers vested in them to act for the corporation to any officers or men, even though they are the majority stockholders.

That is a general proposition of law. A board of directors has responsible duties and functions to perform, that is, to attend to the business of the corporation. It is perfectly proper for a board of directors to receive advice and suggestions from a committee of stockholders. A majority of stockholdersalways determine the policy of the corporation. A majority of the stockholders control the corporation through its board of directors, and when the stockholders living at a distance or foreign stockholders, if they are interested in the corporation here and if they own [218] the majority of the stock, want to participate in the

management of the corporation, it is perfectly proper for them to meet and appoint a committee among themselves to look after the affairs and the details of the corporation, and to submit their findings and their conclusions to the corporation. It would not be proper for the corporation to turn over its control to that committee, but it is proper for the corporation to receive suggestions and reports from this advisory committee and then act upon the matter independently themselves as a board. You are instructed that when they do this it is perfectly proper. They have complied with the law. They still discharge their duties and functions as members of the board, because the final conclusion is theirs and their judgment is exercised and they either approve or disapprove of the suggestion of the advisory board.

Now, in this case as I have already told you, count 4 is withdrawn from your consideration, a motion to dismiss has been granted. That is where the plaintiff seeks to recover on the 5 per cent commissions on the distributions made of the capital return by the defendant, and you are not concerned with that. Mr. Miller, owner of the stock, seconded the resolution and voted for it, and that estops him from claiming the compensation was either not authorized or was not reasonable, because the defendant entered upon the discharge of his duty under the resolution and it became a contract as between the defendant and all the stockholders or members of the board who were a party to it. So Miller cannot recover for that, and the plaintiff knew of it and

he succeeded to that stock and he may not recover for that. [219]

The Court likewise eliminated from your consideration all the claims for the 2½ per cent commission for the years 1912, 1913, 1914, 1915 and 1916, and the 1918 commission after that, and that was within the period of three years. The statute of limitations is three years. In order to have a right of action a party must assert a claim within the period of limitation, which is three years in this state.

Now, the defendant says the plaintiff ought not to recover for that for the reason that long prior to that time there was an agreement between the board of directors and stockholders, upon the suggestion and understanding between him and the advisory committee of the majority stockholders, which the testimony shows here is from sixty-five to eighty or eighty-five per cent,—I do not remember; you will remember about that—and the plaintiff admits that he knew of this. He at the time was auditor and continued to be auditor for many years, and secretary for a time. He knew of the payment of the 2½ per cent every year it was paid; so that he was fully advised, just as fully as though a minute had been made or a formal resolution had been given and placed upon the minutes. There is testimony here that the board of trustees knew about this and there is testimony here that this was made in the annual report by the audit committee, being supplemented by a supplemental detailed audit by the plaintiff in this case as auditor or bookkeeper, and this was dis-

cussed in detail by the trustees at the annual meeting. This was also sent to the advisory committee of the majority stockholders and approved, and this was done every year from [220] the time of the inception of the item until all the payments were covered.

You are instructed in this case that if you find that this was done and that these audits were made—and there is no testimony to the contrary—and were approved by the board of trustees at their annual meetings, as some testimony shows here that they were, and the plaintiff knew of them, of which there is no dispute—he said he did,—then the plaintiff cannot recover in this case for any of the 2½ per cent commissions that would be due to him on his 60 shares of stock, and if you find from the testimony in this case that these reports, this audit in the annual reports, were approved by the trustees, together with the supplemental reports, and were placed on file—and the testimony shows, you will remember what the testimony shows—it would seem to indicate that—then the plaintiff cannot recover for the 2½ per cent commission on the Miller stock; and in this connection I will say that it is competent for a board of trustees to agree to pay its officers any salary which they deem to be right so long as they act within the scope of honesty and the services that are rendered are commensurate with the salaries paid. No yardstick can be given to you, gentlemen of the jury, to fix the compensation which shall be commensurate for any given service. That must be determined by the testi-

mony and facts which have relation thereto; and if you believe from the evidence in this case that these reports were made—of which I say there is no dispute—and were discussed and considered by the board of trustees at their annual meetings and the plaintiff had knowledge of them, [221] which he says he did, then it is immaterial whether there was a formal resolution entered upon the minutes formally approving it.

Now, with relation to the 5 per cent commission, you are instructed that the plaintiff in this case would be entitled to recovery of his part or that part of the 5 per cent which would be charged against his 60 shares, unless the testimony shows that the services which were performed by the defendant were authorized and the compensation authorized by the board of trustees and the services were reasonably worth that amount. It is competent for the board of trustees,—it would be competent for the board of trustees in this case under the resolution of January 7, 1919, to pay or authorize payment of 5 per cent commission upon the distribution, if from the evidence you believe that this 5 per cent commission arrangement was inaugurated and agreed upon prior to that time and that the services—when I say "prior to that time" I mean at the time when they entered upon the liquidation and the defendant entered upon it with that understanding—and the services rendered were reasonably worth that sum, then he would be entitled to the full compensation. The burden is upon him to show that the service performed was reasonably worth the amount which the resolution that was passed

on the 7th of January authorized to pay. If he did not, if you are not satisfied by a fair preponderance of the evidence, then the plaintiff in this case would be entitled to recover two and a half a share—did you figure it out?

Mr. FISHBURNE.—Beg pardon, your Honor. [222]

The COURT.—It is two and a half a share?

Mr. FISHBURNE.—It would be two dollars and a half on the $500,000.

The COURT.—Two dollars and a half on the $500,000 that was distributed prior to the adoption of the resolution, and it was likewise when he drew his salary up to the 30th of November. In order for him to keep from paying the two and a half a share, the defendant must show to you by the fair preponderance of the evidence that the service performed by him in the liquidation of this concern was five per cent of the amount returned to the stockholders, and the salary paid to the 31st of September, 1918, if you believe by a fair preponderance of the evidence that it was worth that, the plaintiff cannot recover; but if you believe it was not worth that and that it was worth a less sum, then you must find for the plaintiff in such sum as you believe he ought to be credited on that stock.

Now, in considering the value of the services you should take into consideration the distribution or liquidation of all of the assets. It might be very easy and of little, comparatively little labor or service to distribute the first part, the first $500,000, and then the after $500,000 might be worth a great deal

more. So that in considering the compensation and reasonable value, you should take into consideration the entire estate in the liquidation.

I believe I have covered the law.

Gentlemen of the jury, it requires your entire number to agree upon a verdict, and when you have agreed you will cause the verdict to be signed by your foreman whom you [223] will elect immediately upon retirement to your jury-room. If you find for the plaintiff you will compute the sum that you find for him and write it in the blank form of the verdict. Then it will read:

"We the jury in the above-entitled cause find for the plaintiff and fix the amount in the sum of —— Dollars," and write in the amount, and if you find for the defendant, use this form:

"We the jury in the above-entitled cause find for the defendant."

Whichever verdict you find you will cause it to be signed by your foreman.

Are there any exceptions?

Mr. FISHBURNE.—I should like to make some exceptions at this time.

Plaintiff desires to except to that part of the Court's instructions holding that the claim of Miller and Denman are both barred by the statute of limitation; that is, that part prior to the years 1917.

The plaintiff further desires to except to the instructions with regard to that part of the instructions wherein you tell the jury that in considering the plaintiff's right to recover the defendant should be allowed a reasonable value for his service.

And we further except to that part of your Honor's instructions in which you exclude from the consideration of the jury and refuse to allow them to consider or take from their consideration the 4th cause of action, one of the assigned claims of Mr. Charles A. Miller. [224]

We further desire to except to that part of your Honor's instructions which modifies the right of the plaintiff to recover the $2.50 for the $500,000 which we claim was paid in September, by saying if the defendant was entitled to the reasonable value, that is if his services would be reasonably worth that, in that event he could not recover.

The COURT.—Yes, that is what I said.

Mr. FISHBURNE.—Now, may it please the Court we further desire to except to your Honor's refusal to grant and give the jury our instruction No. 1.

The COURT.—Did you file them with the clerk?

Mr. FISHBURNE.—I did not file them because the clerk said the rule did not require it.

The COURT.—You can file them and there will be no question about it.

Mr. FISHBURNE.—We except to your Honor's refusal to grant instruction No. 1.

We also desire to except to your Honor's refusal to give instruction No. 2 as asked for.

We also desire to except to your Honor's refusal to give our instruction No. 3.

And we also desire to except to your Honor's refusal to give No. 4, which has just been recently handed to you by Mr. Denman.

The COURT.—Exception to each of these. [225]

The instructions numbered 1, 2, 3 and 4 requested by the plaintiff and refused by the Court, to which refusal plaintiff excepted and his exceptions were allowed, are in the following language, to wit:

PLAINTIFF'S REQUESTED INSTRUCTION No. 1.

You are instructed that according to the articles of incorporation and by-laws of the Pacific Cold Storage Company the board of trustees alone have the power to fix the salaries of its officers, and that the plaintiff was one of the board of trustees and that if the defendant collected $18,000.00 from the accumulated profits of the Pacific Cold Storage Company without a prior resolution of the board of trustees authorizing him to do so the plaintiff is entitled to recover on his first and second causes of action.

PLAINTIFF'S REQUESTED INSTRUCTION No. 2.

You are instructed that for the month of September, 1918, the defendant Charles Richardson received a salary of $1,000.00 a month and that said defendant had no right or authority to collect from the shareholders $25,000.00 or five per cent of the $500,000.00 liquidated and returned by the trustees as a reduction of the capital stock of the company before September 30, 1918, and that the plaintiff is entitled to recover from the defendant on account thereof $2.50 a share or $150.00 on account of the third cause of action and $1995.00 on account of the fourth cause of action.

PLAINTIFF'S REQUESTED INSTRUCTION No. 3.

The law is that defendant Richardson while acting as trustee cannot receive any back pay for past services, and if any resolution was passed by the board of trustees in January [226] 1919 giving the defendant Richardson five per cent commission for converting the assets of the Pacific Cold Storage Company into money and liquidating the affairs of the corporation, the defendant cannot recover for any past services or any past liquidation of assets and can only recover for such sums, if any, as he liquidated after January 7, 1919.

PLAINTIFF'S REQUESTED INSTRUCTION No. 4.

You are instructed that the trustees and officers of the Pacific Cold Storage Company such as its president, vice-president, secretary, treasurer, etc., presumptively serve without compensation, and they are entitled to no compensation for performing the usual and ordinary duties pertaining to the office, in the absence of some express provision therefor by statute, charter, or by-laws, or by an agreement to that effect, and unless such provision or agreement was made and entered into before the services were rendered.

Mr. McCORD.—I just want, out of abundance of precaution,—I don't know whether my instructions were filed or not,— [227] but I want to except to the refusal of your Honor to give the 1st requested instruction, that is the one as to the instructed verdict.

We except to the refusal of the Court to give the 2d requested instruction, as requested.

The same as to three.

The same as to the fourth instruction.

The same as to the fifth.

The same as to the sixth, seventh, eighth, ninth and tenth; I except to each one separately as though had specifically and particularly.

The COURT.—I think I covered them all. Exception will be noted.

Mr. McCORD.—I want my exception to go to each separately, to each instruction separately.

The COURT.—Oh, yes.

JUROR.—The jury is somewhat in doubt as to part of your instruction. They want to know whether in your instructions you are instructing we can set the compensation for the defendant if we find that the compensation taken is excessive.

The COURT.—If you are satisfied that the compensation is excessive then you can assess to him—you should give the defendant such credit as he ought to have, and find for the plaintiff for the portion that would go to his stock.

JUROR.—Your Honor, in taking into consideration the Resolution of January 7, 1919, are we to consider that as legal approval?

The COURT.—You have the right to consider in passing upon the reasonableness of the service all ideas and all expressed conclusions of stockholders and other interested parties upon [228] the same relations that the plaintiff understood his. You have a right to consider what the majority

stockholders felt was reasonable compensation. You have a right to consider what the witnesses testified, who were stockholders, what they thought to be reasonable compensation.

ANOTHER JUROR.—May I ask a question? Now, in case—I am just suggesting—the jury decided that the defendant's compensation should be one-half of what has been given, now, will our decision override the action of the trustees, can we override by our decision upon the amount to be given? There is nothing in the verdict there that we are to render, no space for us to fill that in or anything of that kind.

The COURT.—After you have voted upon that you will find the amount that you feel that he ought to have,—that proportion of the per cent that he would have received if the defendant had not received the compensation which he did, and in determining what the services were reasonably worth you should take into consideration all of the evidence and what this advisory committee thought and what their testimony here shows in relation to that, and likewise the plaintiff's testimony as to what he thought reasonable benefits.

Mr. FISHBURNE.—May I ask your Honor a question? I want to ask if I understand that the jury can determine what is a reasonable amount to be allowed for the services of Mr. Richardson even if it should be different from what the trustees say? Can the jury under your instruction—

The COURT.—That is the juror's question before, and I answered it.

JUROR.—That is what I asked. [229]

The COURT.—And did I answer it?

JUROR.—Yes.

Mr. McCORD.—I think the instruction is probably correct upon the allowance of the $2.50, your Honor's instruction to the jury as to the allowance of the $2.50 per share on the Denman stock, relative to the 5 per cent commission paid Mr. Richardson, but I desire to except to that instruction because the Court said something that might not be clear,—I think it is confusing to the jury. The Court instructed them that they had the right to allow the plaintiff at the rate of $2.50 a share of the five per cent, or such other sum as the jury thought he ought to receive. It does not fix the standard by which the jury should determine.

The COURT.—Let me fix it this way: In view of the inquiry made and exceptions taken, you are instructed that if you should find from all the evidence that the defendant should not have been paid 5 per cent on the $500,000 that was distributed prior to the actual adoption of the resolution in January and checks sent out while he was receiving salary and believe that he should have simply received the salary, then you find for the plaintiff for $2.50 a share on his stock; and if you should find then that for the balance of the liquidation 5 per cent was reasonable compensation then that is all you can find for him; but if you are not satisfied that is sufficient, if you believe that the defendant should have been paid less than 5 per cent for the $500,000 distributed prior to the actual adoption

of the resolution, then you should find what per cent he should have been paid in addition to the $12,000 if any, and if you find any why then you will compute what is the balance of the per cent that you feel was overpaid [230] to him, what amount to apply to the stock owned by the plaintiff, and find your verdict for that amount.

Mr. McCORD.—I object to that, it is not limited to the amount he sued for.

The COURT.—No, he could not recover more than he sued for. Not to exceed the amount he sued for.

Mr. McCORD.—I object to your Honor's instructions, it seems to leave to the jury that they have the right to reach their conclusion irrespective of the testimony, as to what would be reasonable compensation. I understood that that was the inquiry and if the instruction justifies my construction of it why I would like to have the Court instruct the jury that they should be governed by the evidence and by the issues.

The COURT.—If the jury has the same idea that counsel has, I will say to you that jurors may not arbitrarily conclude upon any issue that is presented to them. While they are the sole judges of the facts in the case, they must conclude what the fact is upon the evidence which is presented and the weight that the jurors give to that testimony. That includes the oral testimony given from the witness-stand and likewise all paper documents that the Court had admitted in evidence, and all of those will be sent out with you to enable you to determine just what the facts are in the case.

Mr. FISHBURNE.—I also would ask that your Honor add that the rule governing—does not have to be bound by the oral testimony.

The COURT.—I have already instructed them on that.

Mr. FISHBURNE.—One other point: We desire to except to just that part of the instructions with regard to the jury being allowed to fix a reasonable amount and ask again that [231] your Honor should give that instruction as I asked for. I think we are entitled to a flat $2.50 per share.

The COURT.—Note exception.

(Jury retired.) [232]

Certificate of Judge to Bill of Exceptions.

Now, in furtherance of justice and that right may be done, plaintiff, Frederick L. Denman, tenders and presents the foregoing as his bill of exceptions in this case to the actions and ruling of the Court and prays that the same may be settled and allowed and signed and sealed by the Court and made a part of the record and certified by the Court to be the evidence at said trial material to this appeal except the exhibits, and to be a true bill of exceptions.

The same is accordingly done and certified this 17th day of Jan., 1923.

JEREMIAH NETERER,
Trial Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern

Division. Jan. 18, 1923. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [233]

Assignment of Errors Accompanying Petition for Writ of Error.

The above-named plaintiff, in connection with his petition for writ of errors, makes the following assignments of error, which he avers occurred in the rulings, orders, judgment, trial and conduct of the above-entitled cause by the above-entitled court, to wit:

1.

The Court erred in denying plaintiff's motion to strike the third and fifth affirmative defenses of the answer of the defendant to plaintiff's seventh amended complaint on the ground that said defenses were sham, frivolous, irrelevant and redundant.

2.

The Court erred in requiring Mr. Denman to testify as to the report and supplemental sheet and information sent by him to the advisory board on the ground that there was nothing to show the creation of such board by the by-laws or action of the trustees of the Pacific Cold Storage Company.

3.

The Court erred in allowing the introduction of any testimony with regard to the advisory board on the ground that there is nothing to show by the articles of incorporation, by-laws or actions of the trustees or stockholders of the Pacific Cold Storage

Company, the creation of said advisory board. [234]

4.

The Court erred in requiring Mr. Denman to testify as to the knowledge of the board of trustees in 1918 or the conversation of such board with regard to the five per cent commission of Charles Richardson on the ground that is is incompetent, irrelevant and immaterial unless the board authorized the five per cent by resolution or in some other legal manner, and that it is immaterial whether or not these men knew in an informal way of said five per cent commission.

5.

The Court erred in excluding evidence offered by Mr. Fishburne that one of the members of the board of trustees in January, 1919, was the president of the bank in which the defendant was director, and that another, Mr. Harold Seddon, was put on the board by Mr. Richardson and that Mr. Moore, another member of the board, was working for the company as bookkeeper, and Mr. Davis was working for the company, and that three or four of the trustees in all were employees of Mr. Richardson working at the Pacific Cold Storage Company and that all of their jobs depended on Mr. Richardson, on the ground that such testimony was material to the issues of this case.

6.

The Court erred in excluding the evidence offered by Mr. Fishburne to prove that a majority of the board of trustees on January 7, 1919, were employees

of Mr. Richardson, owed their jobs to him or were working for the bank of which he was a director.

7.

The Court erred in excluding the evidence that at the time Mr. Miller seconded the motion for a five per cent [235] commission, the witness did not know that Mr. Richardson was getting $1,000.00 a month prior to January 7, 1919, or the two and one-half per cent commission, and that the witness was taken by surprise when he seconded the resolution on the ground that such lack of knowledge and surprise negatived the defense of estoppel.

8.

The Court erred in excluding that part of the first and second causes of action of the plaintiff running back of January 1, 1917, on the ground that it was not barred by the statute of limitations because of the fact that the defendant was a trustee and it was a continuing trust and payments from year to year down to the year of bringing this suit were made under such trust, and the statute of limitations does not run against the *cestui que trust* in favor of the trustee until the trust has been repudiated by the trustee and repudiation brought to the attention of the *cestui que trust.*

9.

The Court erred in excluding the claim of Mr. Miller for the five per cent commission on the ground that under the doctrine of estoppel a man cannot acquire property unlawfully and then set up his own wrong and try to estop an innocent person because he said he was misled, the law being

that estoppel cannot be plead in favor of a man's own fraud.

10.

The Court erred in its ruling on defendant's motion for nonsuit and in his statement of such ruling to the jury in allowing the defendant an offset to plaintiff's suit of a reasonable conpensation for defendant's services, on the ground that the trustees were not given such authority in the [236] resolution empowering them to liquidate the company and that the trustees had no power to delegate their authority to Richardson and that the trustees had no authority to allow Richardson compensation for back pay, and on the ground that neither the president nor trustee of a corporation is entitled to compensation on a *quantum meruit* or for reasonable compensation for his services and can only be compensated on an express agreement entered into with him in advance of his services.

11.

The Court erred in not stating to the jury when he ruled on the motion of defendant for a nonsuit that the defendant would be entitled to a credit for the reasonable value of the service which he performed after he ceased to receive the salary that was paid him, on the ground that neither the president nor trustee of a corporation is entitled to compensation for his services unless such compensation is agreed upon in advance by a resolution of the board of trustees and an agreement with the corporation and the officer performing the services

made in advance of the performance of such services.

12.

The Court erred in his statement to the jury on his ruling on the motion of defendant for a nonsuit in not instructing the jury that there was no liquidation of assets other than bankable paper after January 7, 1919, and in not instructing the jury that there was no resolution allowing the defendant any salary after September 30, 1919, and that the resolution of January 7, 1919, called for back pay and was hence void. [237]

13.

The Court erred in overruling the objection by the plaintiff to the introduction of any evidence by the defendant on the ground that the answer showed no legal defense in law.

14.

The Court erred in not giving the plaintiff judgment on the pleadings on the ground that there was no defense shown and no authority for the advisory board and no legal authority shown for any action of the board of trustees of the Pacific Cold Storage Company.

15.

The Court erred in allowing the defendant to prove the facts relating to the formation and organization of the advisory board on the ground that it is incompetent, irrelevant, and immaterial and there was nothing shown by the articles of incorporation, by-laws or minutes of the Pacific Cold Storage Company authorizing or creating such ad-

visory board and nothing shown by the minutes or verbally that a majority or any other number of the stockholders of the Pacific Cold Storage Company or the trustees or majority of the trustees authorized the creation of such advisory board.

16.

The Court erred in admitting Defendant's Exhibits 15–A, 16–A, 17–A and 18–A, all letters and correspondence and reports between Richardson and the advisory board, on the ground that there was shown no legal authority for the advisory board and that what transpired between the board and the defendant Richardson was *res inter alios acta.*

17.

The Court erred in allowing the defendant to testify that all of the other American stockholders consented to the five [238] per cent commission on the ground that if this money was wrongfully taken from plaintiff it was immaterial that other stockholders consented to the wrong.

18.

The Court erred in allowing the defendant Richardson to testify that it was reasonably worth $100,000 to convert the assets of the Pacific Cold Storage Company into money and distribute them back to the stockholders, on the ground that it was incompetent, irrelevant and immaterial and that the defendant was not entitled to recover for reasonable compensation or any compensation unless legally authorized to receive same in advance by the board of trustees of the corporation.

19.

The Court erred in allowing the defendant to testify that Inglis, the secretary of the advisory board, distributed circulars like the one marked Exhibit 20–A to the stockholders, on the ground that there was nothing to show that the defendant knew of his own knowledge that said circulars were distributed and that it was therefore hearsay evidence.

20.

The Court erred in admitting Exhibit 20–A, the circular alleged to have been distributed by the secretary of the advisory board, on the ground that there is no competent evidence to show that such circular had ever been distributed.

21.

The Court erred in allowing Mr. Richardson to testify as to any discussion of the board of trustees as to the five per cent commission on the ground that the witness stated there was no resolution allowing the five per cent commission and that mere informal meetings of the board of trustees are [239] not sufficient.

22.

The Court erred in allowing Mr. Moore to testify as to the informal conversations of the board of trustees with regard to the five per cent commission of the defendant, on the ground that the witness did not show the date of such conversations and did not show any resolution to that effect, and on the ground that it was incompetent, irrelevant and immaterial.

23.

The Court erred in admitting Exhibits 21–A and 22–A on the ground that it was correspondence between Richardson and Inglis the secretary of the advisory board, and that there was nothing to show that the advisory board had been legally created and that it was *res inter alios acta.*

24.

The Court erred in admitting the testimony of L. R. Manning that ten per cent would be a reasonable commission for the services of the defendant in liquidating the assets of the Pacific Cold Storage Company and returning them to the stockholders.

25.

The Court erred in admitting the testimony of Chester Thorne that ten per cent was a reasonable compensation for the defendant's services in liquidating the assets of the Pacific Cold Storage Company and returning them to the stockholders, that is, ten per cent of $1,300,000.

26.

The Court erred in admitting the testimony of Eugene Wilson that he thought ten per cent of $1,300,000 would be very [240] reasonable compensation for the services of the defendant in liquidating the assets of the Pacific Cold Storage Company and returning them to its stockholders.

27.

The Court erred in admitting the testimony of Rufus Davis that he considered five per cent commission a reasonable sum for the services of the defendant for liquidating the assets of the Pacific

Cold Storage Company and returning them to its stockholders.

28.

The Court erred in admitting the testimony of Ralph F. Stacy that he considered five per cent commission a reasonable sum to allow the defendant for his services in liquidating the assets of the Pacific Cold Storage Company and returning them to its stockholders.

29.

The Court erred in admitting the testimony of the defendant that it was reasonably worth ten per cent or something like $100,000 to convert the assets of the Pacific Cold Storage Company into money and distribute them back to the stockholders.

30.

The Court erred in the admission of the testimony of all the witnesses mentioned in the six preceding assignments as to what would be reasonable compensation for the services of the defendant Richardson in liquidating the Pacific Cold Storage Company and returning its assets to its stockholders on the ground that the defendant Richardson would not be entitled to be allowed any compensation for services either as president or trustee of the Pacific Cold Storage Company unless [241] such compensation had been authorized by resolution of the board of trustees prior to the rendition of such services by said Richardson as president or trustee.

31.

The Court erred in the admission of the testimony of the witnesses mentioned in assignments 24

to 29, inclusive, on the ground that the admission of such evidence negatives and ignores the rule of law forbidding the president or trustee of a corporation from receiving compensation for services for back pay, that is to say, services rendered to a corporation prior to the due and legal authorization of compensation for such services by the board of trustees of the corporation.

32.

The Court erred in allowing Rufus Davis to testify that the liquidation of the Pacific Cold Storage Company was a good liquidation on the ground that it is incompetent, irrelevant and immaterial.

33.

The Court erred in not striking all of the testimony of Rufus Davis relating to the five per cent commission on the ground that it was not shown that there was any formal resolution authorizing the payment of the five per cent commission to Richardson prior to the performance of his duties, and on the further ground that at the time he performed the services for which he is claiming the five per cent commission he was receiving a salary from the Pacific Cold Storage Company.

34.

The Court erred in allowing L. R. Manning, Chester Thorne, Ralph F. Stacy, Eugene Wilson, Rufus Davis and Charles Richardson and each one of them to testify as to what was a reasonable [242] compensation to be allowed the defendant for his services in liquidating the Pacific Cold Storage Company and returning its assets to its stockholders, on

the ground that during practically all the time that he was rendering the services for which he is claiming the compensation of five per cent he was being paid by the Pacific Cold Storage Company his regular salary.

35.

The Court erred in refusing to give plaintiff's requested instruction No. 1 in the following language, to wit:

> "You are instructed that according to the articles of incorporation and by-laws of the Pacific Cold Storage Company the board of trustees alone have the power to fix the salaries of its officers, and that the plaintiff was one of the board of trustees and that if the defendant collected $18,000.00 from the accumulated profits of the Pacific Cold Storage Company without a prior resolution of the board of trustees authorizing him to do so, the plaintiff is entitled to recover on his first and second causes of action."

on the ground that the defendant was not entitled to said compensation unless he was by prior resolution of the board authorized to receive same, and on the further ground that the Court's instructions regarding the two and one-half per cent commission ignored and negatived the rule of law requiring a resolution authorizing compensation to an officer for his services prior to the rendition of such services.

36.

The Court erred in refusing to give plaintiff's re-

quested instruction No. 2 in the following language, to wit:

> "You are instructed that for the month of September, 1918, [243] the defendant Charles Richardson received a salary of $1,000 a month and that said defendant had no right or authority to collect from the shareholders $25,000.00 or five per cent of the $500,000.00 liquidated and returned by the trustees as a reduction of the capital stock of the company before September 30, 1918, and that the plaintiff is entitled to recover from the defendant on account thereof $2.50 a share or $150.00 on account of the third cause of action and $1995.00 on account of the fourth cause of action."

on the ground that the undisputed evidence showed that on September 15, 1918, the capital stock of the Pacific Cold Storage Company had been reduced $500,000 and the proportion of same belonging to the American stockholders was all returned to them on that date and that the defendant Charles Richardson was at the time of said reduction receiving a salary of $1,000 a month and was therefore not entitled to any extra compensation whatever for the liquidation and return of said $500,000.

37.

The Court erred in refusing to give plaintiff's requested instruction No. 3 in the following language, to wit:

> "The law is that defendant Richardson while acting as trustee cannot receive any back pay for past services, and if any resolution was

passed by the board of trustees in January, 1919 giving the defendant Richardson five per cent commission for converting the assets of the Pacific Cold Storage Company into money and liquidating the affairs of the corporation, the defendant cannot recover for any past services or any past liquidation of assets and can only recover for such sums, if any, as he liquidated after January 7, 1919."

on the ground that there is nothing in the record to show that [244] there was any written or verbal resolution by the board of trustees of the Pacific Cold Storage Company to allow the defendant the compensation of five per cent for his services in liquidating the assets of said company and returning same to stockholders prior to the resolution of January 7, 1919, and that the evidence shows that the defendant's compensation was for services rendered prior to January 7, 1919.

38.

The Court erred in refusing to give plaintiff's requested instruction No. 4 in the following language, to wit:

"You are instructed that the trustees and officers of the Pacific Cold Storage Company such as its president, vice-president, secretary, treasurer, etc., presumptively serve without compensation, and they are entitled to no compensation for performing the usual and ordinary duties pertaining to the office, in the absence of some express provision therefor by statute, charter, or by-laws, or by an agreement

to that effect, and unless such provision or agreement was made and entered into before the services were rendered."

on the ground that the defendant is not entitled to compensation for back pay nor entitled to extra compensation for services rendered while he is already receiving a salary for such services, and on the further ground that the Court by his instructions as to allowing the defendant a reasonable compensation for his services overrides and negatives the rule of law requiring a prior resolution of the board of trustees for the compensation of its duly appointed officers or trustees.

39.

The Court erred in holding that the claims of Miller and Denman on the two and one-half per cent commission were barred [245] prior to the year 1917, on the ground that the resolution existing between the plaintiff and defendant was that of a continuing trust from 1912 to 1918 and that the payments made to defendant from 1912 to and including 1918 were payments made to the defendant as trustee and that the statute of limitations did not run in favor of the defendant Richardson and against the plaintiff Denman until the trust relation was ended by the plaintiff demanding from the defendant the amount due him under the trust and a denial and repudiation on the part of the defendant of said trust.

40.

The Court erred in that part of his instruction with relation to the five per cent commission where

he said: "It would be competent for the board of trustees in this case under the resolution of January 7, 1919, to pay or authorize payment of five per cent commission upon the distribution, if from the evidence you believe that this five per cent commission arrangement was inaugurated and agreed upon prior to that time, and that the services—when I say prior to that time I mean at the time when they entered upon the liquidation and the defendant entered upon it with that understanding,—and the services rendered were reasonably worth that sum, then he would be entitled to the full compensation. The burden is upon him to show that the service performed was reasonably worth the amount which the resolution that was passed on the 7th of January authorized to pay. If he did not, if you are not satisfied by a fair preponderance of the evidence, then the plaintiff in this case would be entitled to recover $2.50 a share. * * *

"On the $500,000 that was distributed prior to the adoption [246] of the resolution, and it was likewise when he drew his salary up to the 30th of November. In order for him to keep from paying the $2.50 a share the defendant must show to you by the fair preponderance of the evidence that the service performed by him in the liquidation of this concern was five per cent of the amount returned to the stockholders and the salary paid to the 31st of September, 1918, if you believe by a fair preponderance of the evidence that it was worth that, the plaintiff cannot recover, but if you believe it was not worth that and that it was worth a less sum,

then you must find for the plaintiff in such sum as you believe he ought to be credited on that stock. Now, in considering the value of the services you should take into consideration the distribution or liquidation of all the assets. It might be very easy and of comparatively little labor or service to distribute the first part, the first $500,000, and then the after $500,000 might be worth a great deal more. So that in considering the compensation and reasonable value you should take into consideration the entire estate in the liquidation."

41.

The Court erred in giving the instruction set forth in the preceding assignment of error on the ground that what the services of the defendant were reasonably worth is immaterial to the issues of this cause.

42.

The Court erred in instructing the jury that "in order for him (the defendant) to keep from paying the $2.50 a share (the commission paid the defendant on the $500,000 stock reduced and *return* in September, 1918) the defendant must show to you by the fair preponderance of the evidence that the service [247] performed by him in the liquidation of this concern was five per cent of the amount returned to the stockholders and the salary paid to the 31st of September, 1918, if you believe by a fair preponderance of the evidence that it was worth that, the plaintiff cannot recover; but if you believe it was not worth that and that it was worth a less sum, then you must find for the plaintiff in

such sum as you believe he ought to be credited on that stock.

"Now, in considering the value of the services you should take into consideration the distribution or liquidation of all of the assets. It might be very easy and of little, comparatively little labor or service to distribute the first part, the first $500,000, and then the after $500,000 might be worth a great deal more. So that in considering the compensation and reasonable value you should take into consideration the entire estate in the liquidation."

43.

The Court erred in modifying the right of the plaintiff to recover $2.50 a share on account of the commission collected by the defendant for the return of $500,000 of the capital stock in September, 1918, by saying: "If the defendant was entitled to the reasonable value, that is, if his services would be reasonably worth that, in that event the plaintiff could not recover," on the ground that there is nothing in the record to show that the defendant was entitled to be paid the five per cent commission or the $2.50 a share for the $500,000 capital reduced and returned to the stockholders in September, 1918.

44.

The Court erred in excluding from the consideration of [248] the jury the fourth cause of action, the assigned claim of Miller, for the recovery of the five per cent commission on the ground that according to the offer of proof Charles A. Miller at the time of the seconding of the resolution allowing said five per cent did not know that Richardson

had been receiving a salary of $1,000.00 a month and two and one-half per cent commission on the dividends returned and that said Miller was taken by surprise and could not, therefore, be estopped, and on the further ground that the defendant could not plead an estoppel to his own wrong, and that an estoppel cannot be used to perpetuate a fraud.

45.

The Court erred in instructing the jury, "You have the right to consider in passing upon the reasonableness of the services all ideas and all expressed conclusions of stockholders and other interested parties upon the same relations that the plaintiff understood his. You have a right to consider what the majority stockholders felt was reasonable compensation. You have a right to consider what the witnesses testified who were stockholders what they thought to be reasonable compensation," on the ground that what was reasonable compensation was not at issue in this action, and the sole question was whether or not there had been a resolution by the board of trustees authorizing the payment to defendant of the five per cent commission prior to the rendition of the services by the defendant, and on the further ground that what the majority stockholders felt or thought to be reasonable compensation was incompetent, irrelevant and immaterial and inadmissible. [249]

46.

The Court erred in making and entering the judgment on the verdict of the jury for the defendant.

47.

The Court erred in denying the plaintiff's motion for new trial herein.

48.

The Court erred in instructing the jury that "If you are satisfied that the compensation is excessive then you can assess it to him—you should give the defendant such credit as he ought to have and find for the plaintiff for the portion that would go to his stock."

49.

The Court erred in instructing the jury that "After you have voted upon that you will find the amount that you feel that he (the plaintiff) ought to have,—that proportion of the per cent that he would have received if the defendant had not received the compensation which he did, and in determining what the services were reasonably worth you should take into consideration all of the evidence and what this advisory committee thought and what their testimony here shows in relation to that, and likewise the plaintiff's testimony as to what he thought reasonable benefits."

50.

The Court erred in instructing the jury that "In view of the inquiry made and exceptions taken, you are instructed that if you should find from all the evidence that the defendant should not have been paid 5 per cent on the $500,000 that was distributed prior to the actual adoption of the resolution in January and checks sent out while he was receiving salary and believe that he should have

simply received the salary, then [250] you find for the plaintiff for $2.50 a share on his stock; and if you should find then that for the balance of the liquidation 5 per cent was reasonable compensation then that is all you can find for him; but if you are not satisfied that is sufficient, if you believe that the defendant should have been paid less than 5 per cent for the $500,000 distributed prior to the actual adoption of the resolution, then you should find what per cent he should have been paid in addition to the $12,000 if any, and if you find any then you will compute what is the balance of the per cent that you feel was overpaid to him, what amount to apply to the stock owned by the plaintiff, and find your verdict for that amount." [251]

WHEREFORE the said Frederick L. Denman, plaintiff in error, prays that the judgment of the District Court of the United States for the Western District of Washington, Southern Division, in this case entered, be reversed and that said District Court be directed to grant a new trial of said cause.

G. P. FISHBURNE,
Attorney for Plaintiff in Error.

Service of the foregoing assignment of errors acknowledged this 8th day of Jan., 1923.

KERR, McCORD & IVEY,
Attorneys for Defendant in Error.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jan. 8, 1923. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy Clerk. [252]

Petition for Writ of Error.

Now comes the plaintiff Frederick L. Denman, and says:

That on or about the 19th day of December, 1922, the above-entitled court entered judgment on the verdict in favor of defendant and against the plaintiff dismissing the above-entitled action and giving defendant judgment for his costs herein, in which judgment and the proceedings had prior thereto in this cause certain errors were by the Court committed to the prejudice of this plaintiff that in detail appear from the assignment of errors which is filed with this petition.

WHEREFORE the above-named plaintiff prays that a writ of error may issue in his behalf out of the United States Circuit Court of Appeals for the Ninth Circuit for the correction of the errors so complained of and that a transcript of the record, proceedings, and papers in this cause together with the original exhibits duly authenticated may be sent to said Circuit Court of Appeals.

G. P. FISHBURNE,
A. H. DENMAN,
Attorneys for Plaintiff. [253]

United States of America,
Western District of Washington,
Southern Division,—ss.

We, the undersigned attorneys of record for the defendant in the above-entitled cause, hereby acknowledge due service of the above petition for

writ of error and assignment of error and receipt of a copy of said petition and assignments this 8th day of Jan., 1923.

KERR, McCORD & IVEY,
Attorneys for Defendant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jan. 8, 1923. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy Clerk. [254]

Order Allowing Writ of Error.

On this 8th day of January, 1923, came the plaintiff Frederick L. Denman by his attorneys and filed herein and presented to the Court his petition praying for the allowance of a writ of error together with assignment of errors intended to be urged by him praying also for a transcript of the record and proceedings in said cause, with all things concerning the same, be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

WHEREFORE IT IS ORDERED, ADJUDGED AND DECREED that a writ of error as prayed for by the plaintiff be and the same is hereby allowed and the amount of bond on said writ of error be and is hereby fixed at Seven Hundred Fifty Dollars.

Done in open court this 8th day of January, 1923.

JEREMIAH NETERER,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jan. 8, 1823. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [255]

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, Frederick L. Denman, the above-named plaintiff, as principal, and Fidelity & Deposit Company of Maryland, as surety, are held and firmly bound unto Charles Richardson, the above-named defendant, in the sum of Seven Hundred and Fifty & 00/100 Dollars, to be paid to the said defendant, his executors, administrators or assigns, to which payment well and truly to be made we bind ourselves and each of us jointly and severally and firmly by these presents.

Sealed with our seals and dated the 17th day of January, 1922.

WHEREAS the above-named plaintiff has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment rendered in the above-entitled cause by the above-entitled court, and to get a new trial,

NOW, THEREFORE, the condition of this obligation is such that if the above-named plaintiff shall prosecute said writ to effect and answer all costs and damages, if he shall fail to make good

his plea, then the obligation shall be void; otherwise to remain in full force and virtue.

FREDERICK L. DENMAN,
Principal.

FIDELITY & DEPOSIT COMPANY OF MARYLAND.

[Seal] By H. T. HANSON,
Its Attorney-in-fact,
Surety.

The above bond is approved both as to sufficiency and form this 22d day of January, 1923.

NETERER,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jan. 23, 1923. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [256]

Writ of Error.

The United States of America,
Ninth Judicial Circuit,—ss.

The President of the United States of America:
To the Honorable Judge of the District Court of the United States for the Western District of Washington, Southern Division:

Because in the records and proceedings, as also in the rendition of judgment of a plea, which is in the said District Court before you, between Frederick L. Denman, as plaintiff, and Charles Richardson, as defendant, a manifest error hath happened,

to the great damage of the said plaintiff as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, in said Circuit on the 5th day of February, 1923, in the said Circuit Court of Appeals to be then and there held, that the record and [257] proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States of America, this 8th day of January, 1922.

[Seal of U. S. Court]

F. M. HARSHBERGER,
Clerk of the United States District Court for the Western District of Washington.

Allowed this 8th day of Feb., 1923, after the plaintiff in error had filed with the clerk of this

Court with his petition for a writ of error, his assignment of errors.

JEREMIAH NETERER,

Judge of the District Court of the United States, for the Western District of Washington, Southern Division.

Service accepted Jan. 8, 1923.

KERR, McCORD & IVEY,
Attorneys for Defendant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jan. 8, 1923. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [258]

Stipulation Re Transmission of Original Exhibits.

IT IS HEREBY STIPULATED AND AGREED by and between G. F. Fishburne and A. H. Denman, attorneys for the plaintiff, and E. S. McCord, attorney for defendant, that the original exhibits offered in evidence in the trial of the above-entitled action may be transmitted to the United States Circuit Court of Appeals at San Francisco, California, and need not be copied in the transcript of record. An appropriate order therefor shall be entered by the Court and said exhibits and a copy of such order of the court and this

stipulation shall be transmitted to the Appellate Court.

A. H. DENMAN,
G. P. FISHBURNE,
Attorneys for Plaintiff.
KERR, McCORD & IVEY,
Attorneys for Defendant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jan. 31, 1923. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [259]

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please transmit the exhibits with the stipulation and order concerning same to the Clerk of the United States Circuit Court of Appeals of the Ninth Circuit, at San Francisco, California, and prepare and certify to constitute the record on appeal in the above-entitled action typewritten copies of the following papers, omitting all the captions (except the titles of original complaint and the seventh amended complaint), omitting also all the verifications, acceptances of service (except those on the petition for writ of error, assignments of error, citation on writ of error and writ of error) and other endorsements (except the file-marks), said transcript of record to be forwarded to and filed in the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, to be

printed there according to the rules of said Circuit Court of Appeals:

Original complaint and answer.

All amended complaints.

All demurrers and orders overruling and sustaining same.

Original answer and amended answer to seventh amended complaint.

Verdict of the jury.

Judgment on verdict.

Motion for new trial.

Order overruling the same.

Stipulation extending time for perfecting appeal to March 25, 1923.

Order on said stipulation.

Bill of exceptions. [260]

Petition for writ of error.

Assignments of error.

Order allowing writ of error.

Bond on writ of error.

Citation on writ of error.

Writ of error.

Stipulations as to exhibits and orders as to same.

Motion to make more definite and certain and strike original answer to seventh amended complaint filed April 11, 1922, and order on said motion of May 8, 1922.

You are further instructed to request the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit not to include in the printed record the amended complaints from 1 to 6, nor the amended answers except the last amended answer,

if the same be consistent with the rules of the court.

G. P. FISHBURNE and
A. H. DENMAN,
Attorneys for Plaintiff.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jan. 31, 1923. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [261]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing and within typewritten pages, numbered from 1 to 266, is a full, true and correct copy of the record and proceedings in the case of Frederick L. Denman, Plaintiff, versus Charles Richardson, Defendant, in Cause No. 2791 in said District Court, as required by praecipe of counsel filed and shown herein, as the originals appear on file and of record in my office in said District of Tacoma, and that the same constitutes my return on the annexed writ of error herein.

I further certify and return that I hereto attach and herewith transmit the original writ of

error and the original citation on writ of error herein, together with acceptances of service thereon.

I further certify that the following is a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office on behalf of the plaintiff in error for making record, certificate and return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's Fees (Sec. 828 R. S. U. S.) for making record and return, 635 folios @ 15¢ each	$95.25
Certificate of Clerk to Transcript of the Record, 3 folios @ 15¢ each	.45
Seal to said Certificate	.20

[262]

ATTEST my hand and the seal of said District Court at Tacoma, in said District, this 10th day of March, A. D. 1923.

[Seal] F. M. HARSHBERGER,
Clerk.
By Alice Higgins,
Deputy Clerk. [263]

Citation on Writ of Error.

United States of America,—ss.

To Charles Richardson and His Attorneys of Record, GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be

holden at the City of San Francisco, State of California, in said Circuit, on the 5th day of February, 1923, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Western District of Washington, Southern Division, wherein Frederick L. Denman is plaintiff in error and Charles Richardson is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

WITNESS the Honorable JEREMIAH NETERER, Judge of the United States District Court for the Western District of Washington, this 8th day of January, 1923.

[Seal of U. S. Court]

JEREMIAH NETERER,
Judge.

United States of America,
Western District of Washington,
Southern Division,—ss.

We, the undersigned attorneys of record for the defendant in error in the above-entitled cause, hereby acknowledge due service of the above citation and receipt of a copy of said citation this 8th day of Jan., 1923.

KERR, McCORD & IVEY,
Attorneys for Defendant in Error.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern

Division. Jan. 8, 1923. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [264]

Stipulation Re Original Exhibits.

IT IS HEREBY STIPULATED by and between G. P. Fishburne, attorney for plaintiff, and Kerr, McCord & Ivey, attorneys for the defendant, that the original exhibits and a copy of the order to transmit same may be sent to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit in San Francisco, California, by the Clerk of the above-entitled court on or before the day set for the hearing of the oral argument by the said United States Circuit Court of Appeals, and as soon as the attorneys for the defendant have finished with said exhibits in the preparation of their answering brief.

IT IS FURTHER STIPULATED that the copy of said order by the above-entitled court and transmitting said exhibits need not be printed in the transcript of record.

A. H. DENMAN,
G. P. FISHBURNE,
Attorneys for Plaintiff.
KERR, McCORD & IVEY,
By J. N. IVEY,
Attorneys for Defendant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Mar. 9, 1923. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [265]

Order Re Forwarding Original Exhibits.

Agreeably to the written stipulation of the parties heretofore filed in this action, and it being deemed proper by the Presiding Judge,—

IT IS HEREBY ORDERED that none of the original exhibits need be copied in the transcript of record and that all of the original exhibits of the plaintiff, being from 1 to 20, both inclusive, and all of the original exhibits of the defendant, being from 1–A to 24–A, both inclusive, be forwarded by the Clerk of this court to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Done in open court this 8th day of March, 1923.

JEREMIAH NETERER,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Mar. 9, 1923. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [266]

[Endorsed]: No. 3993. United States Circuit Court of Appeals for the Ninth Circuit. F. L. Denman, Plaintiff in Error, vs. Charles Richardson, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court

of the Western District of Washington, Southern Division.

Filed March 13, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the District Court of the United States, Western District of Washington, Southern Division.

No. 2791.

FREDERICK L. DENMAN,

Plaintiff,

vs.

CHARLES RICHARDSON,

Defendant.

Order Extending Time to and Including March 15, 1923, to File Record and Docket Cause.

The Court having considered the stipulation herein,—

WHEREFORE IT IS ORDERED that the time for the return day of the writ of error and the citation and for settling the bill of exceptions and for filing the record and docketing in the above-entitled action with the Clerk of the United States Circuit Court of Appeals be and hereby is extended and enlarged to and including the 15th day of March, 1923.

Done in open court this 8th day of January, 1923.

JEREMIAH NETERER,
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jan. 8, 1923. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy.

No. 3993. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including March 15, 1923, to File Record and Docket Cause. Filed Feb. 23, 1923. F. D. Monckton, Clerk. Refiled Mar. 13, 1923. F. D. Monckton, Clerk.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FREDERICK L. DENMAN, *Plaintiff in Error,* vs. CHARLES RICHARDSON, *Defendant in Error.*	No. 3993

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HON. JEREMIAH NETERER, *Judge.*

BRIEF OF PLAINTIFF IN ERROR

G. P. FISHBURNE,
A. H. DENMAN,
1518 Puget Sound Bank Bldg.,
Tacoma, Washington,
Attorneys for Plaintiff in Error.

Allen & Lamborn Printing Co., Tacoma, Wash.

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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FREDERICK L. DENMAN, *Plaintiff in Error,* vs. CHARLES RICHARDSON, *Defendant in Error.*	No. 3993

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

ASSIGNMENTS OF ERROR

1. The Court erred in denying plaintiff's motion to strike the third and fifth affirmative defenses of the answer of the defendant.

2. The Court erred in allowing the introduction of any testimony with regard to the advisory board.

3. The Court erred in requiring Mr. Denman to testify as to the report and supplemental sheet and information sent by him to the advisory board.

4. The Court erred in requiring Mr. Denman to testify as to the knowledge of the Board of

Trustees in 1918 or the conversation of such board with regard to the five per cent commission of defendant.

5. The Court erred in excluding evidence offered by Mr. Fishburne that one of the members of the Board of Trustees in January, 1919, was the president of the bank in which the defendant was director, and that another, Mr. Harold Seddon, was put on the board by Mr. Richardson and that Mr. Moore, another member of the board, was working for the company as bookkeeper, and Mr. Davis was working for the company, and that three or four of the trustees in all were employees of Mr. Richardson working at the Pacific Cold Storage Company and that all of their jobs depended on Mr. Richardson.

6. The Court erred in excluding the evidence offered by Mr. Fishburne to prove that a majority of the Board of Trustees on January 7, 1919, were employees of Mr. Richardson, owed their jobs to him or were working for the bank of which he was a director.

7. The Court erred in excluding the evidence that at the time Mr. Miller seconded the motion for a five per cent commission, the witness did not know that Mr. Richardson was getting $1,000.00 a month prior to January 7, 1919, or the two and one-half per cent commission, and that the witness was taken by surprise when he seconded the resolution.

8. The Court erred in excluding that part of

the first and second causes of action of the plaintiff running back of January 1, 1917.

9. The Court erred in excluding the claim of Mr. Miller for the five per cent commission.

10. The Court erred in its ruling on defendant's motion for non-suit and in his statement of such ruling to the jury in allowing the defendant an offset to plaintiff's suit of a reasonable compensation for defendant's services.

11. The Court erred in stating to the jury when he ruled on the motion of defendant for a non-suit that the defendant would be entitled to a credit for the reasonable value of the service which he performed after he ceased to receive the salary that was paid him.

12. The Court erred in his statement to the jury on his ruling on the motion of defendant for a non-suit in not instructing the jury that there was no liquidation of assets other than bankable paper after January 7, 1919, and in not instructing the jury that there was no resolution allowing the defendant any salary after September 30, 1919, and that the resolution of January 7, 1919, called for back pay and was hence void.

13. The Court erred in overruling the objection by the plaintiff to the introduction of any evidence by the defendant.

14. The Court erred in not giving the plaintiff judgment on the pleadings.

15. The Court erred in allowing the defendant to prove the facts relating to the formation and organization of the advisory board.

16. The Court erred in admitting defendant's exhibits 15A, 16A, 17A and 18A, all letters and correspondence and reports between Richardson and the advisory board.

17. The Court erred in allowing the defendant to testify that all of the other American stockholders consented to the five per cent commission.

18. The Court erred in admitting the testimony of Charles Richardson, B. A. Moore, L. R. Manning, Chester Thorne, Eugene Wilson, Rufus Davis, Ralph Stacy, and each one of them, as to what it was reasonably worth to liquidate the Pacific Cold Storage Company and return its assets to its stockholders.

19. The Court erred in allowing the defendant to testify that Inglis, the secretary of the advisory board, distributed circulars like the one marked "Exhibit 20A" to the stockholders.

20. The Court erred in admitting Exhibit 20A, the circular alleged to have been distributed by the secretary of the advisory board.

21. The Court erred in admitting the testimony

of Richardson, Moore, Davis and Stacy, and each one of them, as to the knowledge and informal discussion by the Board of Trustees of the five per cent commission prior to January 7, 1919.

22. The Court erred in excluding Exhibit 20, which is a telegram dated the 14th day of February, 1919, from the defendant Charles Richardson to B. A. Moore in the following language, to-wit:

"B. A. Moore,
Pacific Cold Storage Company,
Tacoma, Washington.
Your telegram a surprise. Wire or write me fully of any other stockholders connected with the matter and who they are. It was never my intention to charge him any part of my commission or anyone else connected with company. If Davis has not left ask him to get all information possible and write.

CHARLES RICHARDSON."

23. The Court erred in admitting the testimony of Ralph Stacy giving his reasons for approving the five per cent commission of Richardson and testifying among other things, "I had personal reasons for thinking it was all right. I had some stock which I bought in 1915 at 72 cents on the dollar, which eventually brought me 105, approximately $32.00 a share, almost fifty per cent."

24. The Court erred in refusing to give plaintiff's requested instruction No. 1 in the following language, to-wit:

"You are instructed that according to the ar-

ticles of incorporation and by-laws of the Pacific Cold Storage Company the Board of Trustees alone have the power to fix the salaries of its officers, and that the plaintiff was one of the Board of Trustees and that if the defendant collected $18,000.00 from the accumulated profits of the Pacific Cold Storage Company without a prior resolution of the Board of Trustees authorizing him to do so, the plaintiff is entitled to recover on his first and second causes of action."

25. The Court erred in refusing to give plaintiff's requested instruction No. 2 in the following language, to-wit:

"You are instructed that for the month of Septemper, 1918, the defendant Charles Richardson received a salary of $1,000 a month and that said defendant had no right or authority to collect from the shareholders $25,000.00 or five per cent of the $500,-000.00 liquidated and returned by the trustees as a reduction of the capital stock of the company before September 30, 1918, and that the plaintiff is entitled to recover from the defendant on account thereof $2.50 a share or $150.00 on account of the third cause of action, and $1,995 on account of the fourth cause of action."

26. The Court erred in refusing to give plaintiff's requested instruction No. 3 in the following language, to-wit:

"The law is that defendant Richardson while acting as trustee cannot receive any back pay for

past services, and if any resolution was passed by the Board of Trustees in January, 1919, giving the defendant Richardson five per cent commission for converting the assets of the Pacific Cold Storage Company into money and liquidating the affairs of the corporation, the defendant cannot recover for any past services or any past liquidation of assets and can only recover for such sums, if any, as he liquidated after January 7, 1919."

27. The Court erred in refusing to give plaintiff's requested instruction No. 4 in the following language, to-wit:

"You are instructed that the trustees and officers of the Pacific Cold Storage Company such as its president, vice president, secretary, treasurer, etc., presumptively serve without compensation, and they are entitled to no compensation for performing the usual and ordinary duties pertaining to the office, in the absence of some express provision therefor by statute, charter, or by-laws, or by an agreement to that effect, and unless such provision or agreement was made and entered into before the services were rendered."

28. The Court erred in instructing the jury that the claims of Miller and Denman on the two and one-half per cent commission were barred prior to the year 1917.

29. The Court erred in that part of his instruction with relation to the five per cent commission where he said: "It would be competent for the Board

of Trustees in this case under the resolution of January 7, 1919, to pay or authorize payment of five per cent commission upon the distribution, if from the evidence you believe that this five per cent commission arrangement was inaugurated and agreed upon prior to that time, and that the services—when I say prior to that time I mean at the time when they entered upon the liquidation and the defendant entered upon it with that understanding—and the services rendered were reasonably worth that sum, then he would be entitled to the full compensation. The burden is upon him to show that the service performed was reasonably worth the amount which the resolution that was passed on the 7th of January authorized to pay. If he did not, if you are not satisfied by a fair preponderance of the evidence, then the plaintiff in this case would be entitled to recover $2.50 a share. * * *

"On the $500,000 that was distributed prior to the adoption of the resolution, and it was likewise when he drew his salary up to the 30th of November. In order for him to keep from paying the $2.50 a share the defendant must show to you by the fair preponderance of the evidence that the service performed by him in the liquidation of this concern was five per cent of the amount returned to the stockholders and the salary paid to the 31st of September, 1918, if you believe by a fair preponderance of the evidence that it was worth that, the plaintiff cannot recover, but if you believe it was not worth that and that it was worth a less sum, then you must find for

the plaintiff in such sum as you believe he ought to be credited on that stock. Now, in considering the value of the services you should take into consideration the distribution or liquidation of all the assets. It might be very easy and of comparatively little labor or service to distribute the first part, the first $500,000, and then the after $500,000 might be worth a great deal more. So that in considering the compensation and reasonable value you should take into consideration the entire estate in the liquidation."

30. The Court erred in instructing the jury that: "In order for him (the defendant) to keep from paying the $2.50 a share (the commission paid the defendant on the $500,000 stock reduced and returned in September, 1918) the defendant must show to you by the fair preponderance of the evidence that the service performed by him in the liquidation of this concern was five per cent of the amount returned to the stockholders and the salary paid to the 31st of September, 1918, if you believe by a fair preponderance of the evidence that it was worth that, the plaintiff cannot recover; but if you believe it was not worth that and that it was worth a less sum, then you must find for the plaintiff in such sum as you believe he ought to be credited on that stock.

"Now, in considering the value of the services you should take into consideration the distribution or liquidation of all of the assets. It might be very easy and of little, comparatively little labor or service to distribute the first part, the first $500,000, and then the after $500,000 might be worth a great deal more.

So that in considering the compensation and reasonable value you should take into consideration the entire estate in the liquidation."

31. The Court erred in modifying the right of the plaintiff to recover $2.50 a share on account of the commission collected by the defendant for the return of $500,000 of the capital stock in September, 1918, by saying: "If the defendant was entitled to the reasonable value, that is, if his services would be reasonably worth that, in that event the plaintiff could not recover."

32. The Court erred in excluding from the consideration of the jury the fourth cause of action, the assigned claim of Miller, for the recovery of the five per cent commission.

33. The Court erred in instructing the jury: "You have the right to consider in passing upon the reasonableness of the services all ideas and all expressed conclusions of stockholders and other interested parties upon the same relations that the plaintiff understood his. You have a right to consider what the majority stockholders felt was reasonable compensation. You have a right to consider what the witnesses testified who were stockholders what they thought to be reasonable compensation.

34. The Court erred in instructing the jury that "If you are satisfied that the compensation is excessive then you can assess it to him—you should

give the defendant such credit as he ought to have and find for the plaintiff for the portion that would go to his stock."

35. The Court erred in instructing the jury that "After you have voted upon that you will find the amount that you feel that he (the plaintiff) ought to have—that proportion of the per cent that he would have received if the defendant had not received the compensation which he did, and in determining what the services were reasonably worth you should take into consideration all of the evidence and what this advisory committee thought and what their testimony here shows in relation to that, and likewise the plaintiff's testimony as to what he thought reasonable benefits."

36. The Court erred in instructing the jury that "In view of the inquiry made and exceptions taken, you are instructed that if you should find from all the evidence that the defendant should not have been paid 5 per cent on the $500,000 that was distributed prior to the actual adoption of the resolution in January and checks sent out while he was receiving salary and believe that he should have simply received the salary, then you find for the plaintiff for $2.50 a share on his stock; and if you should find then that for the balance of the liquidation 5 per cent was reasonable compensation then that is all you can find for him; but if you are not satisfied that is sufficient, if you believe that the defendant should have been paid less than 5 per cent for the $500,000 distributed

prior to the actual adoption of the resolution, then you should find what per cent he should have been paid in addition to the $12,000 if any, and if you find any why then you will compute what is the balance of the per cent that you feel was overpaid to him, what amount to apply to the stock owned by the plaintiff, and find your verdict for that amount."

37. The Court erred in making and entering the judgment on the verdict of the jury for the defendant.

38. The Court erred in denying the plaintiff's motion for new trial herein.

ISSUES OF THE CASE

After the formal allegations of the incorporation of the Pacific Cold Storage Company, the complaint alleges its dissolution and then alleges in the first cause of action:

II.

That the capital of said corporation from and after April 10, 1901, was the sum of One Million Dollars divided into ten thousand shares of the par value of One Hundred Dollars each. That at the time said corporation ceased to do business Frederick L. Denman owned 60 of said shares; that said shareholder remained at all times since owner of the funds of said corporation to be distributed to him upon dissolution on his shares as such former stockholder.

III.

That during the existence of the said Pacific Cold Storage Company the profits realized from its

business each year were in part declared to be dividends and to the amount so declared paid as dividends to the shareholders of said corporation, that the profits not so declared to be dividends were retained and accumulated by said company and at the time said company ceased to do business and dissolved were available for distribution and said accumulated profits were then distributed to said shareholders with the exception of the portion unlawfully appropriated by defendant as stated in following paragraphs.

IV.

That in each year commencing with the year 1912 and ending with the year 1918 the defendant, without authority from said corporation, its trustees or its stockholders, and while acting as Trustee and President, wrongfully and unlawfully misappropriated and converted to his own use from said accumulated funds and undivided profits an amount equal to two and one-half per cent of amount paid to said shareholders as dividends, as follows, to-wit:

Date	Dividend	Amount Taken
January, 1912	$100,000.00	$2,500.00
January, 1913	100,000.00	2,500.00
January, 1914	100,000.00	2,500.00
January, 1915	60,000.00	1,500.00
January, 1916	80,000.00	2,000.00
January, 1917	80,000.00	2,000.00
January, 1918	200,000.00	5,000.00

Total Dividends, $720,000.00.

Total taken by Defendant, $18,000.00.

V.

That of the amounts so wrongfully and unlawfully taken as above set forth there belonged to the stock of F. L. Denman and became due thereon from the defendant on dissolution of said corporation the sum of $108.00 and interest on said amount at the legal rate of six per cent per annum from and after the 31st day of May, 1918, the date of the dissolution of said company, which amount the defendant refuses to pay although demanded of him prior to the commencement of this action. (Transcript pp. 14 to 17.)

The second cause of action is the same as the first except that it is based on the stock of Charles A. Miller amounting to 798 shares, which shares and the rights arising out of them were assigned by Miller to Denman, and the amount stated to be due on account thereof is $1,436.40 and interest from May 31, 1918, the day the corporation was alleged to have been dissolved.

The third cause of action alleges the incorporation of the Pacific Cold Storage Company and its dissolution the same as in the first and second causes of action, and then alleges the ownership of 60 shares of stock by the plaintiff and that at the time the Pacific Cold Storage Company ceased to do business the plaintiff owned said 60 shares of stock and has at all times since been the owner of the funds of said corporation to be distributed to him on dissolution in proportion to his shares as former stockholder, and then alleges:

III.

That while acting as such trustee for the shareholders after said company had ceased to do business, the defendant without any consideration whatever, wrongfully, and unlawfully appropriated to his own use from the capital return of said corporation, certain sums at the times and in the amounts stated as follows, to-wit: In or about the month of January, 1919, the sum of $25,000.00; in or about the month of June, 1919, the sum of $25,000.00, and in or about the month of January, 1920, the sum of $2,500.00, making a total of funds so misappropriated by the defendant, to his own use in the amount of $52,-500.00; that the amount so taken was $5.25 for each share and included $315.00 belonging to F. L. Denman on his 60 shares.

IV.

That there is now, therefore, due and owing from the said Charles Richardson for money so had and received by him to the use of the plaintiff the sum of $315.00 together with interest at the legal rate of six per cent per annum on said amount from and after the month of January, 1920. That before the commencement of this action plaintiff demanded payment of the sum of money above set forth from the defendant, who has paid no part of the same. (Trans. pp. 21 to 23.)

The fourth cause of action rests on the same state of facts as the third cause of action and differs from it only in the fact that it is based on an as-

signed claim of Charles A. Miller arising out of the latter's ownership of 798 shares of stock in the Pacific Cold Storage Company and amounting to the sum of $4,189.50.

The difference in the amount is found in paragraph "IV" of the fourth cause of action, wherein, after charging the defendant with the total misappropriation of $52,500.00, it says: "That the amount so taken was $5.25 for each share and included $4,189.50 belonging to said Charles A. Miller on his 798 shares," and again in paragraph "V" of the fourth cause of action, where it says: "That there is now, therefore, due and owing from the said Charles Richardson for money so had and received by him to the use of the plaintiff the sum of $4,189.50 together with interest at the legal rate of six per cent per annum on said amount from and after the month of January, 1920." (Trans. p. 25.)

FACTS OF THE CASE

To establish the first and second causes of action plaintiff proved that the defendant was president and one of the trustees of the Pacific Cold Storage Company from January, 1911, to September 30, 1918, and trustee until May 31, 1920; and that although the defendant was receiving a salary of $12,000.00 a year or $1,000.00 a month as such president in addition thereto and without having previously obtained any authority therefor from the Board of Trustees or stockholders of the Pacific Cold Storage Company, commencing with the year 1912 and ending with the

year 1918, the defendant under the guise of a salary misappropriated the following sums of money:

January, 1912, ...	$2,500.00
January, 1913, ...	2,500.00
January, 1914, ...	2,500.00
January, 1915, ...	1,500.00
January, 1916, ...	2,500.00
January, 1917, ...	2,000.00
January, 1918, ...	5,000.00

making a total misappropriation of $18,000.00, and that on this account there was due on the 60 shares of stock of the plaintiff F. L. Denman at the time of the dissolution of the Pacific Cold Storage Company the sum of $108.00 and on the 798 shares of Charles A. Miller, acquired by the plaintiff by assignment from said Miller, the sum of $1,436.40. (Exhibit 1, book containing Minutes and By-Laws of Pacific Cold Storage Company from its inception to its dissolution, and Trans. p. 115.)

To sustain the third and fourth causes of action it appears that the Pacific Cold Storage Company was engaged in the raising of stock and shipping and selling of all kinds of meats in Alaska and in two places in Canada, and that their important plants and most of their properties were in the following places, to-wit: Their cold storage plant and principal place of business was at Tacoma, Washington, and their branches were at Glasgow, Scotland, Nome, St. Michael, Tanana, Iditarod, Ruby and Fairbanks, all in Alaska, and Dawson and Gleichen, both in Canada. The defendant was president and one of the trustees of the company from January, 1911,

through September, 1918, and trustee alone from October 1, 1918, to May 31, 1920. (See Transcript of Record.)

Commencing in November, 1917, and ending in December, 1918, the Pacific Cold Storage Company sold all of its assets except office supplies of the value of $875.00 and accounts of the value of $375.00. (See Transcript, testimony of Denman, pp. 108, 109). It had sold its Alaska assets and the cold storage plant in Tacoma prior to April 5, 1918, and had obtained all the office space it required for the low rental of $20.00 per month and reduced the office force to two, a bookkeeper and stenographer in Tacoma, and another man, a Mr. Davis, to attend to the Gleichen affairs until the company made some disposition of its assets there. On April 5, 1918, all that remained to be done was to close up the company's affairs, which, according to the defendant, he hoped to complete by the first of June, 1918, and make all of its collections by the early fall of 1918. (See Plaintiff's Exhibit 13.)

Accordingly, at a meeting of the trustees of the Pacific Cold Storage Company held on April 24, 1918, in its cheap $20.00 office in Tacoma, they approved of the sale of all of the Tacoma plant and assets in Alaska and all its steamers (being two) and barges (being four) and a $60,000.00 sale of four markets and a ranch, and a $7,000.00 sale of a lease, and resolved to reduce the capital stock of the company from $1,000,000.00 to $500,000.00 and to call a

meeting of the stockholders for that purpose on July 10, 1918. (See Exhibit 1, p. 321.)

On May 31, 1918, at the annual meeting of the shareholders, a majority of them approved all of the sales made by the officers and recorded in the minutes of the company and all of the acts of the trustees and officers shown in the minutes since the last meeting of the stockholders, among which was the meeting of April 24, 1918, above mentioned, and further resolved that

> "WHEREAS it is the desire of the stockholders that the company should be liquidated, and all of its assets sold, and that a return of capital be made as speedily as possible, therefore,
>
> "BE IT RESOLVED, That the officers of this company are directed to sell and dispose of all of the assets of the company as rapidly as possible, and wind up its affairs, returning to the shareholders the amount realized therefor."

and appointed as trustees for the ensuing year Charles Richardson, Ralph Stacy, C. A. Miller, R. J. Davis, Harold Seddon, and B. A. Moore.

On July 10, 1918, 8022 shares of stock of the Pacific Cold Storage Company, more than two-thirds of the capital stock, among other things resolved as follows:

> "WHEREAS this company has assets valued at a million dollars over and above all debts or liabilities, and that the capital stock and actually paid in is the sum of one million dollars, and that the whole amount of the debts and liabilities of said company amount to $32,745.28, and,

"WHEREAS it appears to the interest of the company to reduce its capital stock to one half million dollars, therefore

"BE IT RESOLVED, that the capital stock of the Pacific Cold Storage Company be and is hereby diminished to one half million dollars, and that five hundred thousand dollars be repaid to the stockholders thereof as a return of capital. That the Trustees are directed to take all proper steps to make such return as speedily as possible. * * *

"WHEREAS, at the annual meeting of the stockholders of this company, held on May 31, 1918, it was resolved that this company should be liquidated and all of its assets sold and a return of capital made as speedily as possible, therefore,

"BE IT RESOLVED that the stockholders present in person and by proxy, hereby confirm and approve the said Resolution and authorize, and empower the trustees to make all contracts, agreements and sales necessary to be made, to fully carry out said resolution, hereby confirming and approving what they may do in the premises." (See Exhibit 1 Minutes.) p 292, 293 294

Pursuant to this resolution to reduce the capital stock and repay the stockholders $500,000.00, arrangements were made and it was returned to the stockholders on September 15, 1918. (See Plaintiff's Ex. 14 and Ex. 1, pp. 296 to 299 inc., and Trans. pp. 134, 135, 142, 163, 164, 169.) The defendant was receiving a salary of $1,000.00 a month as president of the Pacific Cold Storage Company, and yet in January, 1919, he took a commission of five per cent on said $500,000.00 returned in September, 1918, or

$25,000.00 as additional compensation. (Transcript p. 134 and answer.)

Commencing in November, 1917, and ending in December, 1918, the Pacific Cold Storage Company sold, including the Tacoma plant, property totalling in value $951,835.67, and nothing was sold after January 1, 1919, except office supplies of the value of $875.00 and accounts of the value of $309.99 and no assets were converted into money after January 1, 1919, except a total of receipts in the sum of $242,522.88, and said receipts consisted of notes, bonds, good accounts or liquid assets and all of it was bankable paper. (See Transcript pp. 108, 109.)

So the Pacific Cold Storage Company was in process of liquidation from November 1, 1917, until the end of December, 1918, and Charles Richardson, the defendant, was receiving for his services during that time a salary as president of $1,000.00 a month from November 1, 1917, to September 30, 1918, or $11,000, in January, 1918, a two and one-half per cent bonus on dividends of $5,000.00, and in addition thereto "for liquidation of the company" five per cent commission on the amounts returned to the shareholders amounting to the sum of $52,500.00. The minutes of the Pacific Cold Storage Company are unusually detailed and complete and yet no resolution of the Board of Directors is found in the minutes authorizing the payment of this $52,500.00 except one of January 7, 1919. This resolution incorporated correspondence between the defendant

and the advisory board consisting of a letter of July 12, 1918, from the defendant making his offer as to the compensation he was to receive for liquidation of the company, and a cable and letter from the advisory board accepting the offer and resolving "that the offer contained in the letter of Mr. Richardson of July 12th be and the same is hereby accepted and the agreement as set forth in the correspondence between Charles Richardson and the advisory board as herein referred to be and the same is hereby ratified and the officers of the company are authorized and directed to pay the compensation named and to fully carry out all the terms of the agreement.' The offer contained in the letter of Mr. Richardson of July 12 was "That I will devote my time to the liquidation of the company for a commission of five per cent on the amounts returned to the shareholders, my salary to cease on September 30, 1918." (See Transcript pp. 45, 46, 53-55.)

There was an attempt by defendant to get around the well settled principle of law that "no officer of a corporation can receive any compensation for the performance of official duty except by express contract preceding the rendering of the services" by proving that there was such an agreement made by an informal verbal resolution of the trustees of the Pacific Cold Storage Company prior to the rendition of the services by the defendant, which was not made a part of the minutes.

The only witnesses to prove this resolution were Richardson, Moore, Davis and Stacy.

Mr. Richardson was unable to remember the date of such resolution either in 1917 or 1918 and could not say positively how many trustees were present, saying "I think three or four, four perhaps," and gave as the names of the four "I think Mr. Stacy and Mr. Moore and myself and Mr. Davis," and testified that at the time the four discussed it there was no resolution or anything to that effect allowing the defendant the five per cent commission and that none of these alleged informal resolutions were spread upon the minutes because they did not want the public and Waechter Brothers, their competitors, to know what they were doing. (Transcript 143, 144, 145, 158, 159.) It is queer that the Pacific Cold Storage Company on May 31, 1918, should spread a resolution upon the minutes of the company to sell its property and wind up its affairs and yet should not add the amount of compensation to be received by Richardson for fear of the competitors of the company.

Mr. Moore on direct axamination testified that he was present at a trustees' meeting held immediately after the stockholders' meeting in May, 1918, but on cross-examination he said he did not remember the date of the meeting in May, 1918, and that it was not unlikely it was after that date and that it was very likely after May 31, 1918, and the only people he remembered as being present were "myself and Mr. Richardson and Mr. Davis, possibly, and Mr. Stacy."

Again on direct examination Mr. Moore testi-

fied that during the summer of 1918 Mr. Richardson showed to him correspondence and telegrams he received from the advisory board accepting his offer to do the liquidation work for five per cent, and to the question "Do you recall whether Mr. Stacy was there or not at that time?" he replied, "Well, in August, 1918, I think it was likely he was," and to the question "What is your recollection?" he said, "I think the meeting would not have been held without his presence," and to the question, "Who else was there, do you recall?" he said, "Mr. Stacy, myself, Mr. Richardson and Mr. Davis."

Mr. Moore on cross-examination stated that he did not know the date of the meeting in 1918 in which there was either a resolution or discussion of the five per cent commission of defendant, and to the question "Was there any resolution, was the matter up as a resolution that this should be adopted or was it voted on in any way?" replied, "Such resolution if made might appear in the record book." And to the question "Do you know whether there was ever any resolution formally coming before them?" replied, "The chances are, as I remember, there was a resolution, but as to whether it was spread on the minutes I do not know," and did not either on direct or cross examination testify at all as to the vote of the Board of Trustees. (See Transcript, pp. 161, 162, 163, 167, 168, 169.)

Mr. Davis said he could not recall any meeting of the Board of Trustees authorizing the five per

cent commission after the meeting of the stockholders of May 31, 1918, and he could not remember a formal resolution was introduced at that time or not, and the witness then testified "that the matter as to the five per cent commission was drawn to the Board of Trustees at that time 'and my recollection is that no action was taken because even as late as 1918 we did not care for advertising the fact that we were converting the assets of the company into cash and expected to retire from the business,' " and to the question "Was there any action taken in the way of a passage of a resolution and not spread upon the minutes, any action—it does not have to be spread upon the minutes to be a valid action—, but I want to know whether the board acted upon this matter and approved the payment of the five per cent commission to Mr. Richardson?" the witness replied, "I could not say just exactly what action was taken." It was not shown by Davis that a majority of the board ever voted to allow the defendant this five per cent commission. (See Transcript, 182, 183, 184.)

Ralph Stacy testified that he would not say how long he knew of the telegram from Inglis (of the advisory board) approving the proposition of paying Richardson five per cent, but some weeks at least, and it was not proved by him that there had been any discussion or vote of the Board of Trustees upon this five per cent commission of Richardson's prior to January 7, 1919. (See Transcript, pp. 196, 197, 198.)

So if there was any other agreement or legal resolution by the Pacific Cold Storage Company to pay Richardson this five per cent commission other than the *ex poste facto* contract embodied in the resolution of January 7, 1919, we fail to find it in the record.

Some time in 1917, when Mr. Richardson was receiving his salary and bonus, Mr. Davis and Mr. Cox and himself spent perhaps a week or ten days before Mr. Davis went up to Alberta discussing the whole situation and it was decided what they would do in every detail as to the Alberta sales. (See Transcript, 160.) Mr. Davis, under these instructions, went to Alberta in 1917 and made some progress there and again went there in June, 1918, when the principal part of the disposition of the assets took place and the various properties in Alberta were sold in 1917 and on or before August, 1918. (See Transcript, 179, 180), and practically everything had been sold before Mr. Richardson left for California in November, 1918. (See Transcript, 160.)

So in a corporation with capital stock of only $1,000,000 the defendant, commencing in January, 1911, and ending September, 1918, received in salary and bonuses the sum of $123,000, and in January, 1919, he took $25,000, in July, 1919, $25,000 and in January, 1920, $2,500, or a total of $52,500, under the guise of a commission for liquidating the company. And he does this at the time he is acting as trustee of the corporation and as such should protect the company from illegal exactions.

Practically all of the liquidating of the company requiring the services of the defendant was done before he left for California in November, 1918, and he was receiving a handsome salary and a bonus for these services up to the end of September, 1918, and yet he exacts an additional sum of $52,500 as a commission for services already rendered and paid for.

STATUTE OF LIMITATIONS NO BAR TO ANY OF FIRST AND SECOND CAUSES OF ACTION

In 1 Pomeroy Remedies, Sec. 28, it is said:

> "In cases of express continuing trusts, 'so long as the relation of trustee and *cestui que* trust continues to exist, no length of time will bar the *cestui que* trust of his rights in the subject of the trust as against the trustee, unless circumstances exist to raise a presumption from lapse of time of an extinguishment of the trust, or unless there has been an open denial or repudiation of the trust brought home to the knowledge of the *cestui que* trust which requires him to act as upon an asserted adverse title.' "

The reason for the rule is that the possession or legal title of the trustees is the possession or title of the *cestui que* trust and the statute cannot run against the *cestui que* trust until the trust has been repudiated and the trustee's possession or title is in his own right and adverse to that of the *cestui que* trust.

Thus, in *Oliver vs. Piat,* (U. S.) 11 L. Ed. 332, on page 409, Justice Storey says:

"The mere lapse of time constitutes of itself no bar to the enforcement of a subsisting trust, and the time begins to run against the trust only from the time when it is openly disavowed by the trustee who insists upon an adverse right and interest, which is fully and unequivocally made known to the *cestui que* trust. * * * There may have been an unjustifiable delay and gross inattention on the part of some of the proprietors. But as against persons perfectly connusant of the trust it can furnish no ground for any denial of the relief which the case otherwise requires."

The directors of a corporation are trustees of the corporation and so the Statute of Limitation does not run against the claim of a corporation against its officers for misappropriation of corporate funds. *Ellis v. Ward,* 25 N. E. 530; *McConnell v. Combination M. & M. Co.,* 76 Pac. 195 (on re-hearing 79 Pac. 248); *Miner v. Bell Isle Ice Co.* (Mich.) 53 N. W. 218; 17 L. R. A, 412.

Thus in the case of *Ellis vs. Ward, supra,* an Illinois case, the court, on page 533, uses the following language:

"It is a principle of general application, and recognized by this court, that the assets of a corporation are, in equity, a trust-fund, (*St. Louis, etc., Min. Co. v. Sandoval, etc., Min. Co.,* 116 Ill. 170, 5 N. E. Rep., 370,) and that the directors of a corporation are trustees, and have no power or right to use or appropriate the funds of the corporation, their *cestui que* trust, to themselves, nor to waste, destroy, give away or misapply them, (*Holder v. Railway Co.,* 71 Ill. 106; *Cheeny v. Railway Co.,* 68 Ill. 570; 1

Mor. Priv. Corp. Secs. 516, 597). And it is equally well settled that no lapse of time is a bar to a direct or express trust, as between the trustee and *cestui que* trust. *Railroad Co. v. Hay,* 119 Ill. 493, 10 N. E. Rep, 29; *Wood, Lim.* Sec. 200, and cases cited in note. If the trust assumed by the directors of a corporation in respect of the corporate property under their control is to be regarded as a direct trust, as contradistinguished from simply an implied trust, then it is apparent, under the rule announced, the statute presents no bar to this proceeding by the receiver of the corporation. Ordinarily, an express trust is created by a deed or will, but there are many fiduciary relations established by law, and regulated by settled legal rules and principles, where all the elements of an express trust exist, and to which the same legal principles are applicable; and such appears to be the relation established by law between directors and the corporation. 2 Pom. Eq. Jur. Sec. VI., p. 633; 3 Pom. Eq. Jur. Secs. 1088-1090, 1094. And see, also, as respects stockholders, *Hightower v. Thornton,* 8 Ga. 486; *Payne v. Bullard,* 23 Miss. 88;*Curry v. Woodward,* 53 Ala. 371."

Again in the case of *McConnell v. Combination M. &M Company,* above cited it was held that a series of illegal acts continuing over a period of several years such as the successive misappropriation of money for compensation illegally claimed is pursued until the commencement of an action against the officers and directors therefor by minority stockholders, laches cannot be predicated of plaintiff's delay in bringing suit. And the court on page 200 says:

"Three of these directors met, and voted one of their number a salary as secretary. The

Supreme Court, in affirming the judgment in favor of the defendant rendered in the district court, uses the following language: 'The appellant was a director of the corporation, and intrusted with its interest in a fiduciary capacity. He owed to his principal his fair, impartial, and disinterested judgment in fixing the salary of its secretary. The corporation had the right to demand of him his entire vigilance in its behalf. It is intolerable that an agent be suffered to act at the same time, in the same matter, for himself and principal too. The result of such a course, if allowed, would be manifest. The act of a fiduciary agent in dealing with the subject-matter of his trust, or the interest-matter of his trust, or the interest intrusted to his care and keeping, to his own individual gain and profit, is viewed by the courts with great jealousy, and will be set aside on slight grounds. The doctrine is founded on the soundest morality, and is frequently recognized. *Oil Co. v. Marbury,* 91 U. S. 587 (23 L. Ed.328). All transactions so tainted are voidable, without regard to the fairness or honesty of the act. *Graves v. Mining Co.,* 81 Cal. 303, 22 Pac. 665. And so a director of a corporation cannot vote himself a salary. *Ward v. Davidson,* 89 Mo. 445, 1 S. W. 846; *Butts v. Wood,* 37 N. Y. 317. The rule is enforced with great rigor against officers voting themselves salaries. *Thomp. Liab. Off.* 351. They cannot properly act on, nor form part of a quorum to act on, a proposition to increase their compensation. *Bank v. Collins,* 7 Ala. 95. Certainly they cannot vote themselves 'back pay.' It is like giving away the assets of the corporation. *Cook Stocks & S.,* Sec. 657, p. 856; *Holder v. Railroad Co.,* 71 Ill. 106 (22 *Am. Rep.* 89). See also *Wickersham v. Crittenden,* 93 Cal. 17; 28 *Pac.* 788; *Hardee v. Sunset Oil Co.* (C. C.), 56 Fed. 51. In *Jones v. Morrison,* 31 Minn. 140, 16 N. W. 854, the court, in considering the legality of the act of

four directors of a corporation in voting three of their number salaries, says: 'They are agents of the corporation, and, as in cases of other agents, their acts on behalf of their principal, in matters where their own interests come in conflict with those of the corporation—where their self-interest may tend to deprive the corporation of the full, free and impartial exercise of the judgment and discretion which they owe to their principal—are looked upon and scrutinized with great jealousy by the courts. Their acts in such cases are *prima facie* voidable at the election of the corporation or of a stockholder.' "

The opinion further says (p. 202):

"There might be some force in this contention if the complaint here made only went to a single act, but the same course of conduct was pursued up to the very commencement of this proceeding. There is no room here for any claim that either the corporation or the minority stockholders have acquiesced in or ratified this conduct. *Miner v. Ice. Co.,* 93 Mich 112; 53 N. W. 218; 17 L. R. A. 412."

Again, in the case of *Miner v. Bell Isle Ice Co.,* the court says:

"Defendant Lorman must be held to have made these contracts with himself. He directed, influenced and controlled the board. They had no personal interest in the affairs of the company and exercised not their own judgment and discretion but Lorman's will. All the authorities agree that it is essential that a majority of the quorum of a board of directors shall be disinterested in respect to the matters voted upon. In any case the burden is upon the directors to show fairness, reasonableness and good faith and

upon this record these transactions must not only be held to be constructively fraudulent, but fraudulent in fact.

"There might be some force in the contention that complainant is chargeable with laches if he had not commenced the former suit and the act complained of was a single one committed in 1882. Here the same course of conduct has continued up to the very commencement of this proceeding and persisted in notwithstanding its pendency. There is no room for any claim that the corporation has acquiesced in or ratified this conduct. A ratification by Lorman and his dummies of his own act could not purge it of its fraudulent character."

The foregoing case further holds that where a majority of the stock controlled the directorate and are themselves the wrongdoers they are liable for a breach of trust at the suit of a minority stockholders, and that where a number of stockholders combine to constitute themselves a majority in order to control a corporation as they see fit they become for all practicable purposes the corporation itself and assume the trust relation occupied by the corporation toward its stockholders.

The court further says:

"The corporation itself holds its property as a trust fund for the stockholders who have a joint interest in all its property and effects and the relation between it and its several members is for all practicable purposes that of a trustee and *cestui que* trust. Citing *Peabody v. Flint,* 6 Allen 52-56; *Stevens v. Rutland and B. R. Co.,* 29 Vt., 550."

In the case at bar the defendant Richardson voted a majority of the stock by proxy from 1912 to the end of 1918 and owned about twelve per cent of the stock and so it would have been futile for the plaintiff Denman to endeavor to get relief through the corporation should he have desired to do so, and so the Statute of Limitations would not run against Denman. (See Plaintiff's Exhibit 1, Trans. p. 10). But even if the statute could have been construed as barring the claim of Frederick L. Denman prior to 1917 it certainly did not bar the claim of Mr. Miller prior to that date because, as shown in Assignment of Error 7, Mr. Miller did not know that Richardson was getting the two and one-half per cent commission on January 7, 1919.

ADVISORY BOARD HAS NO LEGAL EXISTENCE.

Assignments of Error 2, 3, 15, 16, 19 and 20 all refer to errors of court in admitting testimony with regard to the advisory board and the communications had between defendant and such board and the circulars distributed by such board to its members.

The only testimony as to the creation of the advisory board was admitted over the objection of plaintiff and was as follows:

"When the company was organized and the stock was subscribed in Great Britain, constituting Scotland and England, I (Charles Richardson) was unwilling to assume the whole responsibility for the

company, as they had eighty-five per cent. of the stock, so I suggested at a stockholders' meeting over there that they appoint a committee to work in harmony with us over here, which they did, and that went into effect it seems to me like in 1901 or 1902. I felt they had no way of expressing their views as to the policy of the company and that I was under obligation as near as possible in every way to carry out their wishes, which I did through the history of the company." (Trans. 136, 137).

There was nothing to show how many of the stockholders were present at this meeting nor how many voted for the creation of the advisory board. But even if this had been done, it would not have affected the case because under the statutes of the State of Washington creating corporations such a board would be illegal.

Under Section 3679 of Remington & Ballinger's Code, Section 3805 of Remington's Compiled Statutes of Washington, 1922, in prescribing the contents of the articles of incorporation it is provided among other things that said articles shall state "the number of trustees and their names who shall manage the concerns of the company for such length of time (not less than two nor more than six months) as may be designated in such certificate.

Under Section 3683, Remington & Ballinger's Code, Sec. 3809, said Remington's Statutes, in enumerating the powers of a corporation it is provided that when the certificate shall have been filed the

persons who shall have signed and acknowledged the same and their successors shall have power "to appoint such officers, agents and servants as the business of the corporation shall require, to define their powers, prescribe their duties, and fix their compensation; and to make by-laws not inconsistent with the laws of this State or the United States."

Section 3686, Remington & Ballinger's Code, Sec. 3812 said Remington's Statutes, provides that "The corporate powers of a corporation shall be exercised by a board of not less than two trustees, who shall be stockholders in the company, at least one of whom shall be a resident of the State of Washington and a majority of them citizens of the United States * * * and who shall, after the expiration of the term of the trustees first elected, be annually elected by the stockholders at such time and place within this State and upon such notice and in such manner as shall be directed by the by-laws of the company."

So, according to the law of the State of Washington, the constitution, as it were, of a corporation, is its articles of incorporation. The statutes are the by-laws of the corporation and the governing power is the trustees of the corporation. There is no theory of law that would make admissible the testimony pointed out in the above assignments of error unless we should adopt as a legal maxim that a man can pull himself up by his own boot-straps. Defendant Richardson, to authorize an illegal act, tries to get the

authority of an illegal board, a creature of his own creation.

We think this error is so obvious that it needs the citation of no authority, but nevertheless refer the court to one Washington case, that of *Murray v. MacDougall & Southwick Co.,* 88 Wash. 358, in which it was held that a contract employing a manager of a corporation for a term of years is subject to termination by the trustees at any time, under Rem. & Bal. Code, Section 3683, providing that the board of trustees shall have power to appoint officers and "to remove them at will," and the contract is not enforceable on the theory of ratification by the unanimous vote of the stockholders, since they have no power to direct or compel the employment of any person, and to permit them to do so would defeat the policy of the law. And the court after quoting from Section 3683 of Remington & Ballinger's Code says: "It will be observed that the whole management of the corporation is in the board of trustees and the fact that the stockholders may have authorized or may have ratified an act does not take it without the statute."

So that according to this Washington decision the unanimous vote of the stockholders in the instant case would be incompetent and if the unanimous vote would be incompetent, the vote or opinion of eighty-five per cent. would be incompetent. But the court allowed the defendant to go further than this. He allowed the communications and actions of a committee alleged to represent eighty-five per cent. of the

stockholders concerning the compensation of Richardson to be introduced in evidence when there was nothing in the record to show that a majority of this eighty-five per cent. of the stockholders had ever created the advisory committee or elected anyone to act on same.

CONSENT OF OTHER AMERICAN STOCKHOLDERS IMMATERIAL.

The error in admitting the testimony of defendant that all of the other American stockholders consented to the five per cent. commission is controlled by the same principles as the error in admitting the transactions between Richardson and the advisory board. Under the laws of the State of Washington and the articles of incorporation and by-laws of the Pacific Cold Storage Company the board of trustees alone have the power to fix the compensation of its officers. Even if a majority of the stockholders consented to this illegal five per cent. commission of Richardson's, their assent would not bind a protesting minority. (See the above cited statutes and decision of the State of Washington).

BOARD OF TRUSTEES COULD NOT DELEGATE DUTY OF HIRING RICHARDSON AND FIXING HIS SALARY.

The board of trustees of the Pacific Cold Storage Company could not delegate to the advisory board the duty of employing Richardson and fixing his

salary even if we assume, for the sake of argument, that the advisory board has a legal existence.

The defendant to the first and second causes of action, among other things, put up as a defense that "on or about the 14th day of December, 1910, the defendant communicated with the advisory committee and indicated that he was not satisfied with the salary that he had been drawing as such president and requested some additional compensation; that on the 13th day of January, 1911, the said advisory committee in answer to the defendant's letter of December 14, 1910, wrote the defendant as follows:

> "As regard your own remuneration—Since you raised the point a short time ago, the board have had the matter before them, and it was their intention that they would shortly have made you a proposal that you be allowed by way of increased emolument, and annual commission or bonus on the total amount of dividend paid to the shareholders in each year. Such bonus, they propose should be at the rate of 2½%, beginning with the current year.
>
> "They trust that you will view these proposals as a favorable settlement."

Relative to this defense Mr. Denman testified that in January, 1912, Mr. Richardson informed him that he (Richardson) was to have the two and one-half per cent. in dividends additional salary and that on Denman's asking for some authority for the salary voucher Richardson said he would give him a letter instructing him to pay it to him, something he could use for authority in making payments as

auditor of the company, and that he did give him such a letter, but he never made it a matter of record in the board of trustees "and that is all I got." The letter referred to by Mr. Denman is in the following language, to-wit:

> "By virtue of a resolution passed by the advisory board at its annual meeting in January, 1911, I was voted 2½% as a bonus on all dividends declared in addition to my salary. You will therefore issue me a check for 2½% on dividends in addition to my regular dividend. Signed, Charles Richardson, President." (Trans-, p. 121).

Mr. Morehouse, a witness on behalf of the defendant, testified concerning the same as follows: "When that two and one-half per cent. extra remuneration first arose—I think it was in 1912 or thereabouts—I asked what was the authority for it and Mr. Denman at that time referred me to Mr. Richardson. I took the matter up with Mr. Richardson when I took up other matters arising from the examination, and then Mr. Richardson showed me the authority from the advisory board at Glasgow for that extra remuneration," and he said that he did not at that time show him anything in the minutes or tell him anything about the action of the board of trustees and he did not testify that at any other time Richardson ever showed him any authority from the board of trustees to pay this two and one-half per cent. bonus. (Trans., p. 170).

If there was ever any authority given by the board of trustees to pay Richardson this two and

one-half per cent. commission we may rest assured that he would have called it to the attention of Mr. Denman or Mr. Morehouse at that time. So that the only authority ever shown by the defendant for the payment to him of the two and one-half per cent. commission is derived from the advisory board.

The by-laws of the Pacific Cold Storage Company provide in Article 7, Section 1, "It shall be the duty of the board of directors to exercise a general supervision over the affairs of the company; to elect and remove all officers and servants;" and again, in Article 2, Sections 2 and 3, it is provided: "He (the president) may be removed from such office at any time by a majority of the board of directors. He (the president) may receive such remuneration as the board of directors may from time to time determine." The defendant justifies the payment to him of this two and one-half per cent bonus by an agreement made by him (the president) with the advisory board to pay himself the two and one-half per cent. commission.

In short, Richardson as president of the company, with no authority by law, by-law or contract from the board of trustees, makes a contract with an advisory board having no legal existence to pay himself a bonus of two and one-half per cent. on the total amount of dividend paid to the shareholders in each year. Is it his legal theory that two wrongs make a right?

The board of trustees could not delegate to de-

fendant the authority to make this contract on their behalf. It is tainted with illegality. Richardson would be serving two masters, the company and himself.

The board could not delegate this authority to the advisory board because it never had any legal existence and if it had, this duty is expresslly imposed by the by-laws on the board of trustees themselves. "The rule is supported universally that in the absence of authority, express or clearly implied, a board of directors or trustees cannot delegate to subordinate officers or agents the exercise of discretionary powers which by the general laws, the charter, by-laws, the vote of the stockholders or by usage has been vested exclusively in themselves." See Volume 2, *Thompson on Corporations,* Sec. 1204, p. 151; and also Volume 14A *Corpus Juris,* Sec. 1863, pp. 95, 96. In Section 1205 of the same volume of *Thompson on Corporations* it is said: "As an addition to this rule it may be stated that powers expressly granted to a corporation or what is the same thing to the board of directors or trustees by the statute, charter or by-laws, cannot be delegated."

The defendant attempts a similar justification for the payment to him of the five per cent. commission by the resolution of January 7, 1919. This resolution incorporates an agreement between Richardson and the advisory board consummated through correspondence of July 12, 1918, whereby Richardson said that "I will devote my time to the liquida-

tion of the company for a commission of five per cent. on the amounts returned to the shareholders, my salary to cease on September 30, 1918." This last resolution puts a greater strain on defendant's boot-straps than the two and one-half per cent. bonus agreement. On January 7, 1919, by a resolution of the board of trustees when the company had been practically liquidated Richardson attempts to make legal an agreement between himself and the advisory board entered into in January, 1918, when the bulk of the liquidation had been accomplished.

The above mentioned clause of the by-laws that "it shall be the duty of the board of directors to elect and remove all officers and servants" and also Section 4 of Article 7 that "neither the president nor any other officer or agent of this company shall have the power to contract any debts or incur any liabilities on the company's behalf without the authority of the board of directors" are both peculiarly apt. The board of trustees could not delegate to Richardson or the advisory board under the authority above cited the duty of fixing his own compensation. Richardson does not show any authority from the board of trustees to make this contract with himself on behalf of the board.

But suppose the defense attempts to prove the authority required by Section 4 by the testimony of Richardson, Moore, Davis and Stacy as to the loose discussion of the five per cent. commission at meetings of the board. In the first place, the date of none of these meetings is established. In the second place,

at none of them do they show the vote of the majority in its favor who are disinterested in the agreement. In the third place, there is no resolution shown by the board acting as such authorizing the payment of the five per cent. commission prior to the rendition of defendant's alleged services.

Where a corporation is empowered to act only through its directors, the individual or separate action of the members of such board is not sufficient for the agent of the corporation is the board of directors acting in its organized capacity and not its members individually. *Monroe Mercantile Company vs. Arnold,* 34 S. E. 176, 108 Ga. 449; *Peirce v. Morse-Oliver B. L. B. Co.,* 47 A. 914, 94 N. E. 406; *Lockwood v. Thunder Bay River Boom Company,* 4 N. W. 292, 42 Mich. 536; *Audenried v. East Coast Milling Company,* 59 A. 577, 68 N. J. Eq. 450; *Ames v. Gold Field Merger Mines Company,* 227 Fed. 292.

Thus in the case of *Audenried v. East Coast Milling Company* it was held that under the General Corporation Act, Section 12, providing that the business of every corporation shall be managed by its directors, the aid of a board of directors as a means of corporate action cannot be dispensed with by waiver on the part of the stockholders or otherwise.

Again, in the case of *Ames v. Gold Field Merger Mines Company,* decided by Judge Neterer, the judge in this case, it was held that the stockholders of a corporation have a right to expect from their directors a conscientious consideration of every proposi-

tion which is presented and which involves any interest of the company, and such consideration must be given and action taken in formal meetings. The directors have no power to act as such individually nor can they delegate the powers vested in them to act for the corporation to any officers or men, even though they are the majority stockholders.

So that even if the advisory board was shown to have ever been legally elected by a majority of the stockholders residing in Great Britain, the board of trustees could not delegate to them a duty involving the payment to defendant of $52,500 of the corporation's assets.

In addition to the transcript the internal evidence shows there was no resolution by the board of trustees prior to July 12, 1918, meeting the requirements of the corporation law. Thus, if there had ever been any legal resolution prior to July 12, 1918, the date of Richardson's letter to the advisory board fixing his compensation at five per cent, Richardson would never have had the board make the resolution of January 7, 1919; or if such a resolution had been adopted it would have referred to the board's legal resolution of some previous date and merely affirmed it and would never have attempted the dangerous expedient of trying to legalize an illegal agreement by an illegal resolution.

It may be urged, however, that the defendant did not know of the by-laws quoted above. But by-laws are the laws of a corporation and the officers

and trustees are conclusively presumed to know them. Thus in 14 *Corpus Juris,* Sec. 430, p. 345, it is said: "The members of a corporation as a general rule are conclusively presumed to have knowledge of its by-laws and cannot escape liability arising thereunder, or otherwise avoid their operation on a plea of ignorance of them." And again in the same volume, Section 434, p. 438, it is said: "The by-laws of a corporation are binding upon the directors and other officers not only when they are also corporators or members, as is usually the case, but even when they are not. Officers must be presumed to know the by-laws adopted before their appointment and are bound by them as to their tenure of office."

BACK PAY RULE

Although directors of a corporation are not technically trustees, since they do not hold the legal title, it is admitted law that they are within the rules governing the relation of trustees and *cestuis que trustent,* or of agent and principal.

Beers v. Bridgeport Spring Co., 42 Conn. 17; *Holder v. Lafayette, B.&M. R. Co.,* 71 Ill. 106; 22 *Am. Rep.* 89; *Cumberland Coal & Iron Co. v. Parish,* 42 Md. 598; *Hubbard v. New York, N. E. & W. Investment Co.,* 14 Fed. Rep. 675; *Mallory v. Mallory-Wheeler Co.,* 61 Conn. 131; 2 *Cook, Stock & Stockholders, Sections* 647, 648 and cases cited.

In the case at bar, however, the rules governing

the relation of trustees and *cestui que* trust are peculiarly apt because the defendant Richardson from the inception of the company was trustee as well as president and on May 31, 1918, he was expressly appointed by the stockholders to act as one of the trustees in liquidating the company. So he owed a duty to protect the company from the exorbitant claims of himself as well as others.

In 2 *Thompson on Corporations,* Sec. 1715, p. 799, it is said:

> "The general rule is that directors and trustees of corporations presumptively serve without compensation, and they are entitled to no salary or other compensation for performing the usual and ordinary duties pertaining to the office of director or trustee in the absence of some express provision or agreement to that effect."

Again in the same volume, Sec. 1717, p. 802, it is said:

> "As a general rule directors are not entitled to compensation or salary for official services rendered unless such salary or other compensation is provided for in the charter or the by-laws; or unless there is an express resolution or agreement adopted or made by the board of directors acting as such. In the absence of such provision or agreement, and except as otherwise shown, a director, and a president, secretary or treasurer, when a stockholder or a director, cannot recover pay for official service. In concluding an opinion on this subject one of the judges of the West Virginia court said: 'The authorities have led my mind to the conclusion that the

law raises no implied promise to pay compensation to directors, president or vice-president of a private corporation in the absence of provision in by-law or order of the directors. They are trustees charged with the funds, and cannot recover on a *quantum meruit.*' The supreme court of Pennsylvania in an early case went so far as to say on this subject: 'If the services of the director become important to the corporation, let him resign and enter its employment like any other man. If it be proper that directors generally should receive compensation, let it be so provided in the organic act which creates the body. Those who commit their money to its care will then do it with their eyes open. Until this be provided, there is no reason in law or morals for allowing their property to be taken without their knowledge or consent.' ''

And again, in Section 1719, same volume, p 803, it is said:

> ''From principles already asserted, and as indicated by many of the cases cited, a general rule may be stated to the effect that, in order to entitle a director to receive compensation as against the rights of the corporation or of dissenting stockholders, some provisions therefor must be made in advance, either in the governing statute, the articles of incorporation, or the by-laws, or by a resolution duly passed or an agreement formally made by the board of directors acting as such.'

The last quotation from Sec. 1719 is the back pay rule as applicable to directors. To state the rule a little differently:

Directors of corporations cannot recover for services rendered the corporation as other officers,

unless upon a contract or resolution passed by the corporation, or by a vote of the board of directors in which they take no part, or upon some provision made for such compensation, made in the charter or by-laws, all of which must be before such services are rendered.

Graylor v. Sonora Min. Co., 17 Cal. 594; *Butts v. Wood,* 37 N. Y. 317; *Merrick v. Peru Coal Co.,* 61 Ill. 472; *Holder v. Lafayette, B. & M. R. Co., Lafayette, B. & M. R. Co. v. Cheeney,* and *Illinois Linen Co. v. Hough, supra; Citizens Nat. Bank v. Elliott,* 55 Iowa, 104; 39 *Am. Dec.* 167; *Kelsey v. Sargent,* 40 *Hun.* 150; 1 *Morawetz, Priv. Corp.,* Sections 517, *et seq.,* and cases cited; 1 *Beach, Priv. Corp.,* Section 201; *Doe v. Northwestern Coal & Transportation Co.* et al, 78 Fed. 62; *Kilpatrick v. Bridge Co.,* 49 Pa. St. 118; *Mather v. Mower Co.,* 118 N. Y., 629, 23 N. E. 993; *Smith v. Assn.,* 78 *Cal.* 289, 20 Pac. 677; *Burns v. Commencement Bay, Etc., Co.,* 4 Wash. 558; 30 Pac. 668; *Booth v. Summit Coal Mining Co.,* 55 Wash. 167, 104 Pac. 207; *Wonderful Group Mining Co. v. Rand,* 111 Wash. 557, 560, 561, 563.

To illustrate the last ruling in the case of *Doe v. Northwestern Coal & Transportation Company,* the court, on pp. 66 and 67, uses the following language: "The directors of a corporation have not the power to fix their own salaries, nor to bind the corporation by a resolution to pay for services which have been rendered in their official capacity under by-laws which contain no express provision for such compensation. In *Association v. Stonemetz,* 29 Po. St. 534,

in a case where there was no express regulation or contract that the director was to serve without pay, but the by-laws were silent upon that subject, the court said:

> 'A resolution, passed by the corporation after the services were rendered, that such director be paid a certain sum for services rendered as chairman of a committee, was without consideration, and imposed no obligation on the corporation that could be enforced by action.

"Of similar import is *Kilpatrick v. Bridge Co.,* 49 Pa. St. 118. In *Railroad Co. v. Ketchum,* 27 Conn. 170, it was held that a director of a corporation is not entitled to compensation for services rendered to the corporation, unless the services were most unquestionably beyond the range of his official duties. In *Mather v. Mower Co.,* 118 N. Y. 629, 23 N. E. 993, it was held that, where a stockholder of a corporation becomes an officer thereof, and assumes the duties of the office, and performs them without any agreement or provision for compensation, the presumption, in view of his relation and interest, may properly arise that he intends to perform the services gratuitously. The court said:

> 'It is well settled that a director of a corporation is not entitled to compensation for services performed by him, as such, without the aid of a pre-existing provision expressly giving the right to it. They are the trustees for the stockholders, and as such have the management of the corporate affairs. And to permit them to assert claims for services performed, and then support them by resolution, would enable the directors to unduly appropriate the fruits of corporate

enterprise. It would clearly be contrary to sound policy.'

"To the same effect is the case of *Road Co. v. Branegan,* 40 Ind. 361. In *Wilbur v. Lynde,* 49 Cal. 290, it was held that promissory note made bya corporation, payable to its acting trustees, is void. In *Smith v. Association,* 78 Cal, 289, 20 *Pac.* 677, it was held that a note made by a corporation to its president is invalid unless authorized or ratified by the board of directors, and that the payee of such a note was disqualified to vote upon such a resolution. The same doctrine is held in *Jones v. Morrison,* 31 Minn. 140, 16 N. W. 854; *Railway Co. v. Teters,* 68 Ill. 144; *Wood v. Manufacturing Co.,* 23 Or. 20, 23 *Pac.* 848; and in numerous other cases which might be cited.'

Again, in the case of *Burns v. Commencement Bay, Etc., Co.,* 4 Wash. 558, it was held that a trustee of a corporation cannot recover pay for services rendered the corporation when such services are within the line of his regular duties as such trustee, unless there is some express provision therefor in the articles of agreement or by-laws, or some other authority therefor than the actions of the trustees themselves. And the court, commencing on page 565 and ending on page 566, uses the following language:

"It was not claimed by the plaintiff that any resolution had been introduced or acted upon in any of the meetings or the corporation, or of the board of trustees, relating to employing him in the matters aforesaid, or providing for his compensation therefor, which had not been entered upon the record. The verbal au-

thorization that he claims to have had was not proven in any way excepting he seems to have conversed with various members of the company, and that there was a general understanding that he would superintend the construction of the wharf aforesaid; but, as we have seen, it was his duty as one of the trustees of the company to superintend the construction of said wharf.

"It is further provided in the by-laws that the trustees should appoint and remove at pleasure all officers, agents and employes of the corporation and to prescribe their duties and fix their compensation, and this was the only provision therein contained relative to the compensation of any one, and it clearly did not include or authorize them to provide any compensation for themselves or any one of them for the performance of their duties as trustees."

In the instant case it is not shown by the defendant that any resolution had been introduced or acted upon by the board of trustees fixing his compensation prior to the rendition of his services commencing in November, 1917, and the by-laws of the Pacific Cold Storage Company provided that the president and other officers should receive such remuneration as the board of directors might from time to time determine and made no provision for compensation for any of the board of directors. (See Exhibit 1, By-Laws of Company).

Again the court on page 566, "according to his (plaintiffs) own claim, the one thing that was left to be determined was as to his compensation therefor. This understanding was disputed by some of

the other stockholders of the company and this goes to show the insecurity that would result and the objectionable nature of the rule that would allow a trustee of a corporation to recover pay upon an implied contract for services rendered which were within his regular duties," and the court further says:

> "There are some cases which hold that, in the absence of any express prohibition in the articles or by-laws of the corporation preventing its officers from receiving any pay, that they may recover pay on an implied contract for services rendered, although such services were within their duties as officers of the corporation. It seems to us, however, that the better authority is the other way, and that a trustee or officer of a corporation cannot recover pay for such services without an express provision therefor, and this must come from the articles of agreement or by-laws, or from some other source or authority than the action of the trustees themselves. Where a trustee of a corporation performs services which are clearly outside of his duties as trustee, as, for instance, where he is an attorney at law and attends to the litigation of the company, he may recover pay for such services, but it must appear before any recovery can be had therefor, or for any services rendered by a trustee in the absence of any provision for payment, that the same are outside of his official duties, so that there can be no room for doubt in the premises.

In *New York, Etc., R. R. Co. v. Ketchum,* 27 Conn. 169, it is said that—

> "Doubtless a director may perform extra labor, and for it be justly entitled to a compensa-

tion for his time and expenses, and this may be made out even without an express promise, for a promise may be implied from the peculiar and extraordinary services rendered, but then the services must appear to be of an extraordinary character, and this beyond all question of doubt, for as director he agrees to give his services, and is entitled to make no charges whatever, however severe and protracted may be his labors. A different rule would lead to great abuses and corruption. We cannot but think it important in every case, that, where a person holding the position of a director, expects or may be fairly entitled to expect a compensation for his services, the services should appear to have been agreed for, or their nature and extent should appear to be such as clearly to imply that both parties understood they were to be paid for, and not rendered gratuitously within the scope of a director's duty. * * * That directors have no right to charge for performing official duty, is a principle universally admitted to be sound law. We find it so laid down in the elementary books, and in several decided cases and the reasons assigned most forcibly commend themselves to our approbation.' ''

So the Supreme Court of the State of Washington is committed to the doctrine that a trustee cannot recover pay on an implied contract for services or a *quantum meruit.* During practically all of the time the defendant was performing the alleged services for which he claims compensation in the sum of $52,500.00 he was acting as president and trustee and receiving a salary as president, so he cannot claim that the $52,500.000 was to pay him as president, and is caught on the other horn of the dilemma and must claim his compensation as one of the trus-

tees. He cannot, however, make good his claim for compensation as one of the trustees in liquidating the company because his services in liquidating the company commenced in November, 1917, and extended down to November, 1918, and there is no resolution fixing his compensation as such trustee prior to January 7, 1919.

In the case of *Booth v. Summit Coal Mining Company* it was held that an increase in the salary of an officer of a corporation who was a trustee and owned half of the stock, through his own vote and the votes of trustees subservient to him, is fraudulent and illegal, and this, regardless of the value of the services, where it was improperly made in violation of an agreement with the owner of the other half of the stock. And the court, on page 174, uses the following language:

"In *Schaffhauser v. Arnholt & Schaefer Brewing Co.,* 218 Pa. 298, 67 Atl. 417, the supreme court of Pennsylvania said:

> " 'The generally accepted rule, applicable to such cases, is that the voting of a salary or compensation to a director, who either is or is not an officer of the board, must be entirely free from fraud, actual or constructive, and that the action is illegal, if it is determined by the vote of the director, or officer, whose salary is thus increased.'
>
> "The only way in which the respondent Linden's salary could have been increased without his own vote was by his two dummy trustees, who, although trustees in legal form, were entirely subservient to his will. In *Strouse v. Syl-*

vester, 134 Cal. XX., 66 Pac. 660, it was held that an increase of the salary of an officer of a corporation, made by the vote of trustees subservient to him, was fraudulent and illegal."

If anyone would assume that the loose language of the defendant, Moore, Davis or Stacy proved that there had been any prior resolution by the board of trustees allowing the defendant his compensation, such resolution would be illegal because it would have had to have been determined according to their testimony by the vote of Charles Richardson himself.

The above case also shows the error of the court pointed out in Assignments of Error 5 and 6 in excluding the evidence offered by plaintiff to show that one of the members of the board of trustees was president of the bank in which the defendant was director, and that another was put on the board by Richardson, and that Moore and Davis, two others of the board, were working for the Pacific Cold Storage Company and owed their jobs to Richardson.

Again, in the case of *Wonderful Group Mining Co. v. Rand,* 111 Wash. 557, it was held that a board of trustees of a corporation consisting of five members cannot, by the passing of three resolutions, vote compensation for past services to four of the members, although one resolution was for a salary as secretary, one for a salary as treasurer, and the other for legal services to two other trustees, since all but one member were pecuniarily interested in the general plan, and to be valid it would be necessary that three dis-

interested members vote for the passage of each resolution. And the court, on page 560, uses the following language:

"It is unnecessary for us, in view of the determination we are to make of the case, to pass upon the question of whether the board of trustees might, under such power as is contained in the by-laws here, vote back salaries to officers who may also be trustees.

"The record in this case shows clearly that the rule of law which provides that a trustee may not vote upon his own compensation was violated by the resolution of June 3, and that the act of the trustees in passing a series of resolutions awarding money to four out of the five members of the board was void. It appears that the members of the board of trustees felt, and honestly, that, as they by their efforts had secured a favorable sale of the property of the corporation, resulting in a benefit to the stockholders, that therefore they should receive some compensation greater than that which would accrue to them merely through their ownership of stock. The method, however, by which they sought to obtain this extra compensation was not by a resort to the stockholders and from the stockholders to obtain authority to so compensate themselves. When they became members of the board of trustees they were charged with the duty of using their best efforts for the promotio nof the interests of the stockholders, and nothing was done but what should have been done by them in the performance of such duty. By the resolution the trustees were attempting to pay themselves for these general services under the guise of compensation for special services. The record in the case clearly indicates that these resolutions were merely a subterfuge. It appears that, at various times, discussions had taken place among the

trustees, the net result of which was that a majority of them were inclined to compensate themselves after the property was finally disposed of, and that, when it had become apparent that a sale was to take place, and it having in general been agreed to on or before June 3, and that in addition to the sale amount the company was in possession of $9,000, due on royalties on the original sale agreement, which it had decided to retain before agreeing to an extension and modification of the original sale agreement, and that compensation could be secured from that amount, and instead of submitting the matter to the stockholders, the device of June 3 was adopted.

"Granting that the board of trustees might compensate officers but not trustees for past services, it is the rule that, where concerted action of this kind is taken, the passing of a resolution awarding such pay must be had without the vote of any one pecuniarily interested in the resolution. The board of trustees consisting of five members, it was necessary for three disinterested members to vote for the passage of each resolution. The record shows that, of the four voting for each resolution, three were pecuniarily interested in the general scheme, although the scheme was divided into three resolutions. Taking, for instance, the resolution awarding salary to the secretary, we find it was voted for by the president, who was to receive compensation under a companion resolution; the treasurer, who was to receive compensation under a companion resolution, the secretary, who was to receive compensation under the resolution itself, and one of the members who had not pecuniary interest in the general plan."

And again the court says:

"In the case at bar, the affirmative vote of

at least two of the interested parties was needed to pass any one of the resolutions, and such trustees had no more right to vote on any of the resolutions than if only one resolution had been introduced embracing the contents of the entire three. *Jones v. Morrison,* 31 Minn. 140, 16 N. W. 854; *Boothe v. Summit Coal Mining Co.,* 55 Wash. 167, 104 Pac. 207; *Smith V. Los Angeles etc. Ass'n,* 78 Cal. 289, 20 Pac. 677; *Steele v. Gold Fissure Gold Mining Co.,* 42 Colo. 529, 25 Pac. 349."

In the resolution of January 7, 1919, it was provided that the company would "retain the services of Mr. Davis and Mr. Moore for as short a time as possible, they, of course, to be paid their present salaries in the meantime by the company." The minutes show that Moore and Davis voted on this resolution, and again in the testimony of Mr. Moore where the defendant attempted to prove the passage of a resolution in 1918, Mr. Moore testified that those present at the meeting were Mr. Stacy, himself, Mr. Richardson and Mr. Davis. So if we can assume from his loose statements that there was ever a resolution the trustees who voted for same were three of them, namely, Richardson, Davis and Moore, profiting by the resolution. Further elaboration is useless to show the pertinence of the two last cited Washington cases.

In 2 *Thompson on Corporations,* Sec. 1728, p. 814, it is said:

"The general rule as to the right of directors to receive compensation for the discharge of the ordinary duties of their office applies

equally to the executive officers of the corporation. Such officers as president, vice-president, secretary, treasurer, etc., ordinarily are entitled to no compensation, unless provision is made therefor by statute, charter, or by-laws, or by an agreement to that effect, and unless such provision or agreement was made or entered into before the services were rendered. The rule is said to be analogous to that governing trustees generally, who, at common law, are not entitled to compensation, except pursuant to a contract or other proper authority. The rule has been applied in many jurisdictions to the president of private corporations, to the vice-president, and to other officers of corporations. The payment of additional compensation for services rendered under a previously fixed salary, or the payment for services rendered under an agreement that they should be without compensation, was said to be equivalent to the payment of claims which the corporation was under no legal or moral obligation to pay."

Again on p. 815, Sec. 1729, it is said:

"The officers stand in the same relation to the corporation as the directors; consequently, as in the case of directors, the law will not imply a promise by a corporation to pay its officers for their usual and ordinary duties, in the absence of any provision in the charter or by-laws, or any contract or agreement on the subject, but will presume that such services are rendered gratuitously. For example, the law implies no contract to pay the president for services as such and for consulting with and advising other officers and employes of the corporation. No implied promise can be inferred from the fact that the services were beneficial to the corporation; and while, in some relations, a request might be implied from the beneficial character

of the services, yet no such inference is authorized in the case of gratuitous services performed by a person in the line of his legal duty. It is a corollary of the main proposition that officers cannot appropriate the corporate funds in payment for their services without proper authority."

For additional authority to sustain the two preceding paragraphs from *Thompson on Corporations,* see the following cases:

Citizens National Bank v. Elliott, 39 Am. Rep. 167;
Cheeney v. Lafayette Bloomington Etc. R. Co., 18 Am. Rep. 584;
Kilpatrick v. Penrose Ferry Bridge Co., 88 Am. Dec. 497;
Butts v. Wood, 37 N. Y. 317;
Ellis v. Ward, 25 N. E. 530;
Danville H. & W. R Co. v. Case. 39 Atl. 301.

In the case of *Citizens National Bank v. Elliott,* 39 American Reports, 167, it was held that an officer of a corporation cannot recover of the corporation for his ordinary official services except by virtue of a special contract for compensation.

In that case the directors of a bank before the bank was formed agreed that the defendant, who in that particular case was bringing a counterclaim for his salary, should have and receive for his services as vice-president the yearly salary of Two Thousand Dollars, and the court held that the defendant could not recover on an agreement made with the directors of a bank before the bank was formed on the

ground that such an agreement for the payment of salary must be authorized by the by-laws of the corporation after its formation or by a resolution of the board of directors according to such by-laws, and the court says on page 169:

> "We understand the rule to be when an officer of a corporation performs the usual and ordinary duties of his office, as defined by the charter or by-laws, he cannot recover compensation therefor unless it has been so specially agreed. He cannot, in such case, recover what the services are reasonably worth."

> "It was immaterial what was said as to salaries before the corporation was organized. The corporation not being then in existence could not be bound by what was said or agreed upon. The fact the services were performed after the corporation was organized can make no difference unless there was an agreement by the corporation to pay therefor. The mere performance is not sufficient."

Again in the case of *Cheney v. Lafayette, Bloomington, Etc. R. Co.,* 18 American Reports 584, it was held that the director of a railroad company, whose by-laws made no provision for compensation to its officers, held, not entitled to recover for services performed as such director for the company, and the court said on page 586 to 587:

> "In the case of *The Am. Cent. R. R. Co. v. Miles,* 52 Ill. 174, it was held that a director could not recover compensation for services unless they were thus fixed by the directors, and the services of the president and other officers of the company, fall fully within the principle of the rule. The president and directors of such a

company are trustees for the stockholders, and it is for that reason that the law does not imply a promise to pay them for discharging the duties imposed upon persons occupying that relation.

"At the common law, a trustee was not entitled to compensation, and could not recover on a *quantum meruit*. And it was in the application of this rule that it was held, in the *Loan Association v. Stonemetz,* 39 Penn. 534, that a resolution passed by the corporation after services were rendered, that the officer be paid a sum of money for services as chairman of a committee, was without consideration, and imposed no obligation on the corporation that could be enforced. And the case of *N. Y. & N. H. R. R. Co. v. Ketcham,* 27 Conn. 170, illustrates the rule in holding that it does not matter that the services were rendered in the expectation and understanding that the officer should be paid. And in the case of *Butts v. Wood,* 37 N. Y. 317, it was held, notwithstanding the bill for services rendered by an officer where no by-laws or resolution had fixed his pay, and the bill was allowed by the board, that 'one holding a position of trust cannot use it to promote his individual interest in any manner in disposing of the trust property; that the circumstances under which the bill was allowed was a fraud on the shareholders, and to permit such a transaction to stand would be a reproach to the administration of justice.' "

"In *The N. Y. & N. H. R. R. Co. v. Ketcham*, 27 Conn. 175, the court uses this language: 'It would be a sad spectacle to see the managers of any corporation assembling together and parceling out among themselves the obligations and other property of the corporation in payment for past services.' "

Again in the case of *Kilpatrick v. Penrose Ferry Bridge Co.,* 88 American Decisions, 497, it was held

that officers of corporation cannot recover on *quantum meruit* for services rendered to the corporation as such officers. Without an express contract for compensation, no recovery can be had for such services. The court in this case on page 498 uses the following language:

> "The salary or compensation of corporate officers is usually fixed by a by-law or by a resolution, either of the directors or stockholders, but where no salary has been fixed none can be recovered. Corporate offices are usually filled by the chief promoters of the corporation, whose interest in the stock or in other incidental advantages is supposed to be a motive for executing the duties of the office without compensation, and this presumption prevails until overcome by an express prearrangement of salary. Hence, we held in *Loan Association v. Stonemetz,* 29 Pa. St. 534, as a general principle, that a director of a corporation elected to serve without compensation could not recover in an action against the company for services rendered in that capacity, though a subsequent resolution of the board agreeing to pay him for the past services was shown.
>
> "So in *Dunston v. Imperial Gas Company,* 3 Barn. & Ald. 135, a resolution formally adopted allowing directors a certain compensation for attending on courts, etc., was held insufficient to give a director a right to recover for such services.
>
> "And the rule is just as applicable to presidents and treasurers or other officers as to directors. In *Commonwealth Insurance Co. v. Crane,* 6 Met. 64, the company had passed a vote fixing the salary of its president at a certain sum per annum, but when another president was subsequently elected, and he claimed the same

salary, it was held that his claim did not stand on the footing of a written agreement, and that circumstances might be shown to raise the implication that he expected to serve without compensation.

"It is well that the rule of law is so. Corporate officers have ample opportunities to adjust and fix their compensation before they render their services, and no great mischief is likely to result from compelling them to do so. But if, on the other hand, actions are to be maintained by corporate officers for services, which, however faithful and valuable, were not rendered on the foot of an express contract, there would be no limitation to corporate liabilities, and stockholders would be devoured by officers."

Again on page 499, the court says:

"Corporations stand upon their charters, and although their officers are in a certain sense agents of the stockholders, they are also trustees whose rights and powers are regulated by law. That they may not consume that which they are appointed to preserve, their compensation must be expressly appointed before it can be recovered by action at law."

The case of *Butts v. Wood,* 37 N. Y. 317, presented the facts where a director presenting a bill for extra compensation as secretary was held disqualified to act as director to audit such a bill and held that the interested director must not be included in the number to constitute a quorum and that when such board audits the bill any stockholder may sue for himself and any other stockholder who makes himself a party to prevent the payment of the bill by the company. The citation concerns us by virtue of the rule announced by the court. The court says:

"The rule that one holding a position of trust cannot use it to promote his individual interests by buying, selling, or in any way disposing of the trust property, is now rigidly administered in every enlightened nation, and its usefulness and necessity become more and more apparent. A careful examination of the testimony in this case shows that Wood could not have enforced this claim against the company; and the circumstances under which it was allowed and paid were a fraud upon its stockholders. To permit such a transaction to stand would be a reproach to the administration of justice."

Again in the case of *Ellis v. Ward,* 25 N. E. 530, note the facts and the holding of the court. There the president of a corporation, who had served without agreement as to pay, sold his stock to three persons ,who thereby acquired control of the corporation, and made themselves directors. They then voted a sum of money to the president for his past services, and paid the money to him in part consideration for their stock. Held, that they were liable for said sum to the receiver of the corporation, since the president was not entitled to salary.

"The doctrine is well settled in this court that the law will not imply a promise on the part of a private corporation to pay its officers for the performance of their usual duties. In order that such officers may legally demand and recover for such services, or the corporation legally make allowance and payment therefor, it must appear that a by-law or resolution had been adopted authorizing and fixing such allowance before the services were rendered. *Railway Co. v. Miles,* 52 Ill. 174; *Merrick v. Coal Co.,* 61 Ill. 472; *Railroad Co. v. Sage,* 65 Ill. 382;

Cheeney v. Railway Co., 68 Ill. 570, 87 Ill. 446; *Holder v. Railway Co.,* 71 Ill. 106; *Gridley v. Railway Co.,* Id. 200; *Linen Co. v. Hough,* 91 Ill. 63. The rule is analogous to that governing trustees generally, who at common law, were not entitled to compensation, except as there was warrant therefor in the contract or statute under which they acted. It is not pretended that, either by by-law or resolution, the Republic Life Insurance Company fixed any compensation to be paid its president for the performance by him of the duties of that office before or during the time John V. Farwell held that office; and after he ceased to hold such office, it was not competent for that corporation to vote and pay him for his past services. Such appropriation and expenditure of the money of the corporation by its then acting directors, being unauthorized and illegal, might be repudiated by the corporation, or its representative, the receiver, and the sums so wrongfully and illegally expended recovered back."

In the case of *Kleinschmidt v. American Mining Co.* (Mont.) 139 Pac. 785 it was held that when a director of a corporation, voluntarily or by the direction of the board, assumes to perform the duties of secretary or treasurer without prearrangement by resolution, or by-laws, or by contract for compensation, he is not entitled to recover for past services, and any appropriation made by the board for such services is equivalent to giving away the assets of the company.

Again, in the same case it was held that the board of directors of a corporation cannot vote a salary to themselves or to any director, unless au-

thorized by the stockholders, by statute, or by-laws legally enacted.

And also in the same case it was held that where directors of a corporation, under authority vested in them by Civ. Code, 1895, Sec. 401 (Rev. Codes, Sec. 3816), adopted a by-law providing for the appointment of a secretary, but never at any time fixed the compensation, a director who acted as such secretary was not entitled to any compensation.

And the court on page 789 of its opinion uses the following language:

> "According to the rule announced in *McConnell v. Combination M. & M. Co.,* in the original opinion (30 Mont. 239, 76 Pac. 194, 104 Am. St. Rep. 703), and affirmed on the motion for rehearing (31 Mont. 563, 79 Pac. 248), the board of directors has not the inherent power to vote a salary to any director. 'The power to do so must emanate from the stockholders, from the statute, or from by-laws legally enacted.' This rule is inflexible, and is recognized by the decisions and text-writers everywhere. (Citations). Equally inflexible is the rule that the directors —the managing officers of the corporation—cannot legally vote themselves compensation for past services. (Citations). So, also, when a director voluntarily or by the direction of the board, assumes to perform the duties of secretary or treasurer, without prearrangement by resolution or by-laws, or by *contract for compensation, he is not entitled to recover on a quantum meruit for past services, and any appropriation made by the board for such services is equivalent to giving away the assets of the corporation.* (Citations). 'From the employ-

ment of an ordinary servant, the law implies a contract to pay him. *From the service of a director, the implication is that he serves gratuitously. The latter presumption prevails, in the absence of an understanding or an agreement to the contrary, when directors are discharging the duties of other officers of the corporation to which they are chosen by the directory, such as those of president, secretary, and treasurer.'* Again, in *Holder v. Lafayette, B. & M. R. R. Co., supra,* in denying the right of a director to recover for past services as treasurer of the corporation, the court said: 'The board of directors were in the possession of the funds and property of the corporation, and that body had entire control over it, and could disburse it as they chose, either by themselves, by one or more of their number, or by some other person not of the board of directors. Having done so through one of their members, we must suppose that they chose to regard it as a part of his duty as director. Had not such been the intention, it seems to us that a salary would have been provided by a by-law or resolution.' We think the facts disclosed in this case neither call for not permit any relaxation of the general rule.''

The facts in the *Kleinschmidt* case are very similar to the facts in the case at bar. In that case the director voluntarily assumed the duties of secretary and treasurer and apparently received no compensation therefor. In this case the defendant Richardson from November, 1917, through September 30, 1918, was acting as trustee and president and received a salary as president all that time. He could not be compensated for his services as president as he had already been paid handsomely therefor; and even if he had not been paid he could not receive

compensation for performing the duties of president "without prearrangement by resolution or by-laws or by contract for compensation" and "he is not entitled to recover on a *quantu meruit* for past services." He could not receive the five per cent commission for his services as trustee or director because "the implication is that he serves gratuitously" and this presumption prevails in the absence of an understanding or agreement t othe contrary preceding the performance of the duties.

It is patent in this case that practically all of the liquidation services rendered by Charles Richardson preceded the resolution of January 7, 1919, and he did nothing after this latter date entitling him to pay. If, however, he had done anything after January 7, 1919, entitling him to $52,500.00 the burden of proof would be upon him to show this fact, and if he failed to do so and failed to show any services after January 7th distinct from those rendered from November, 1917, up until that date, the whole of the five per cent commission exacted by him would be illegal and plaintiff would be entitled to recover it back. In the absence of a resolution or agreement preceding defendant's services the burden of proof is on the defendant and not on the plaintiff to prove the legality of the alleged commission exacted by him.

The facts and opinion of the *Kleinschmidt* case are so exactly on all fours with the case at bar that we do not believe it is necessary for us to point out the similarily of the two cases.

We have cited no additional authority nor have we placed under a separate heading the proposition that where money has been illegally paid an officer or trustee, it may be recovered back because it naturally follows as a corollary from the doctrines laid down in the text. If, however, there should be any doubt in the Court's mind we refer to Volume 2, *Thompson on Corporations,* Sec. 1763, p. 849, where the author says:

> "Generally where money is paid or voted to an officer as compensation in the absence of an agreement or other proper authority made in advance, the payment is wrongful and may be recovered. This rule rests upon the same foundation as that which compels the restoration of corporate funds or property when wasted or squandered by the directors, or when received by third persons with knowledge of the want of power to transfer it. So, compensation paid an officer for past services, without prior provision or contract, was held to be without consideration and could be recovered."

Again in the same section at p. 851, the author says:

> "A stockholder may compel a president to account for money appropriated by him as an increase of his salary."

As further illustrations of the last proposition laid down in *Thompson on Corporations,* notice the case of *Danville H. & W. R. Co. v. Case,* 39 Atl. 301, in which it is held that money paid an official of a railway corporation on a resolution to recompense him for past services, for which no compensation has

been provided, is without consideration, and may be recovered back. The court in that case said on page 308: "But immense work, whether good or ill, Case performed; and, if this work had been preceded by a contract for reasonable compensation, he would be entitled to a credit for the contract price. But up to November 9, 1871, there was no semblance of contract. Then the board undertook, by a retroactive resolution, to compensate him at the rate of $15,000 per year from March 21, 1867, until the next annual election, in January, 1872. The law is settled (*Loan Ass'n v. Stonemetz,* 29 Pa. St. 534, and cases following it) that no officer of a corporation can receive any compensation for the performance of official duty, except by express contract preceding the rendering of the services."

Again in an action against a corporation, plaintiff alleged that, in consideration that he had rendered services for the defendant in and about its business, at its special instance and request, defendant agreed to pay him $1,000. The affidavit of defense stated that plaintiff had been president of the corporation for 24 days at a salary of $1,800 per annum, and that the only services he had rendered the defendant were as president during said time. Held error to render judgment for want of a sufficient affidavit of defense, as a president of a corporation is not entitled to compensation for his services unless an agreement for compensation preceded them. *Martindale v. Wilson-Cass Co.,* 19 Atl. Rep. 680. The court in that case said on page 680:

"The general rule on the subject of compensation to directors of a corporation is thus stated in 1 *Mor. Priv Corp.* (2d Ed.) Sec. 508: 'Directors are not entitled to any compensation for their official services as directors unless compensation is provided for by the charter or the by-laws adopted by the majority.' The decisions in *Kilpatrick v. Bridge Co.,* 49 Pa. St. 118, and *Association v. Stonemetz,* 29 Pa. St. 534, recognize and enforce this rule. In *Carr v. Coal Co.,* 25 Pa. St. 337, it was held that the secretary of a private corporation, at a fixed salary could not recover extra pay for services in that capacity, although the services were not anticipated at the time of his appointment, and were not enumerated in the charter or by-laws. The official services of a director or president of a private corporation are rendered about its business and at its request, but he cannot recover pay for such services unless an agreement for compensation preceded them. No presumption of such agreement arises from the services. It must be proven."

The facts of the case last cited closely resemble the facts here. The chief business of the Pacific Cold Storage Company from November, 1917, until November, 1918, was liquidating its assets. Thus, the defendant Charles Richardson on page 160 of the transcript said that when he left for California practically everything had been sold — "pretty nearly everything had been sold in November"—and that some time in 1917 in regard to the Alberta sales Mr. Davis and Mr. Cox and himself spent perhaps a week or ten days before he went up there discussing the whole situation, and it was decided what they would do in every particular up there; and the defendant was the president of the company during that period

and received a salary of $1,000.00 a month for his services until September 30, 1918, and a bonus of $5,000.00 in January, 1918. There was no agreement preceding the rendering of such services by him. There was no resolution of the board shown at all in 1917 prior to the rendering of the alleged services and no legal resolution shown in 1918. The facts here, however, are stronger than in that case because it could well be anticipated what Richardson's (defendant's) services would be to the Pacific Cold Storage Company. The defendant himself said: "That the question as to the liquidation of the Pacific Cold Storage Company came up the last time he was in Scotland. He could not recall when but thought it was either in 1913 or 1914. Some of the stockholders over there felt that in case of my death they would be helpless over here and we were discussing as early as 1914 and '15 the question of selling the cold storage company as a going concern and it came up during my visit to Scotland I think in 1914, but I cannot remember accurately. Then it continued in discussion with them and with the board here up until the final liquidation." (Trans. p. 135, 136). If the defendant thought it was worth more to liquidate an idle concern than to run a going one he had ample opportunity to take it up with the board of trustees from 1914 until November, 1917, when the actual liquidation commenced.

There is another difficult question the board should have answered in November, 1917, and that was this: If defendant Charles Richardson was to

receive $52,500.00 for liquidating the company, for what service did he receive $1,000.00 a month from November, 1917, through September 30, 1918, and the additional $5,000.00 in January, 1918?

PLAINTIFF SHOULD HAVE RECOVERED ON FIRST AND SECOND CAUSES OF ACTION UNDER BACK PAY RULE.

As to the two and one-half per cent of the dividends amounting to $18,000.00 appropriated by the defendant from 1912 to January, 1918, Mr. Denman testified:

"In January, 1912, Mr. Richardson informed me that he was to have the two and one-half per cent on dividends additional salary and I suggested to him that it be made a matter of resolutions or I asked for some authority for the voucher. He said he would give me a letter instructing me to pay it to him, something I could use for authority in making payments as auditor of the company, and he did give me such a letter. He never made it a matter of record in the board of trustees and that is all I got." (Trans. p. 121).

On the same subject Mr. Eli P. Moorehouse, witness for the defendant, said that the two and one-half per cent extra remuneration first arose in 1912 or thereabouts, when he asked what was the authority for it and Mr. Denman at that time referred him to Richardson. He took the matter up with Mr. Richardson when he took up other matters arising

from the examination and Mr. Richardson showed him the authority from the advisory board at Glasgow for that extra remuneration, and that he did not think he showed him anything in the minutes or told him anything about the action of the board of trustees. (Trans. p. 170.)

And there was no prior resolution allowing this two and one-half per cent shown in either the minutes or by any competent testimony and so the court clearly erred in excluding evidence that Miller had no knowledge of the two and one-half per cent commission on January 7, 1919, (See Assignment of Error 7), and he erred again in refusing to give plaintiff's requested instruction No. 1 in the following language, to-wit:

> "You are instructed that according to the Articles of Incorporation and By-laws of the Pacific Cold Storage Company the board of trustees alone have the power to fix the salary of its officers and that the plaintiff was one of the board of trustees, and that if the defendant collected $18,000.00 from the accumulated profits of the Pacific Cold Storage Company without a prior resolution of the board of trustees authorizing him to do so, the plaintiff is entitled to recover on his first and second causes of action." (See Assignment of Error 24).

If the court had given this instruction it would clearly have been the duty of the jury to have brought in a verdict for the plaintiff on the first and second causes of action.

REASONABLE VALUE OF DEFENDANT'S SERVICES INADMISSIBLE UNDER BACK PAY RULE.

It is clear that under the back pay rule testimony as to what defendant's services were reasonably worth was clearly inadmissible. Text book and case law have iterated and reiterated this rule and yet the court allowed eight witnesses to testify as to what they thought defendant's services were reasonably worth and several of them placed a value thereon of ten per cent instead of five per cent. (Assignment of Error 18, Trans. pp. 175, 177, 178).

A still more glaring error, he admitted the testimony of Ralph Stacy, one of the experts on the reasonable value of defendant's services, as follows, to-wit: "Furthermore, I had personal reasons for thinking it (meaning the five per cent commission) was all right. I had some stock which I bought in 1915 at seventy-two cents on the dollar. That stock eventually brought me 105, approximately $33.00 per share, almost fifty per cent." (Assignment of Error 23, Trans. pp. 196, 197.)

The admission of all of this testimony is an incurable and reversable error but the court did not stop there. Thus, in his ruling on defendant's motion for a non-suit he instructed the jury that defendant should be allowed an offset to plaintiff's suit of a reasonable compensation for defendant's services, and also that defendant would be entitled to a credit for the reasonable value of the service

which he performed after he ceased to receive the salary that was paid him. At that stage of the suit the court should have instructed the jury "that there was no resolution allowing defendant compensation for liquidating the Pacific Cold Storage Company other than that of January 7, 1919, which was void under the back pay rule." (Assignments of Error 10, 11 and 12).

ERROR OF ADMISSION OF TESTIMONY ACCENTUATED BY COURT'S INSTRUCTIONS

If we assume for the sake of argument that the court could have cured the above errors of admission of testimony by proper instructions, he signally failed to do so, and if the patient escaped with his life with the first errors the case could certainly not survive the last.

Thus, the plaintiff requested the following instruction:

> "You are instructed that for the month of September, 1918, the defendant Charles Richardson received a salary of $1,000 a month and that said defendant had no right or authority to collect from the shareholders $25,000.00 or five per cent of the $500,000.00 liquidated and returned by the trustees as a reduction of the capital stock of the company before September 30, 1918, and that the plaintiff is entitled to recover from the defendant on account thereof $2.50 a share or $150.00 on account of the third cause of action and $1,995.00 on account of the fourth cause of action.' (See Assignment of Error 25.)

The plaintiff was certainly entitled to this instruction whether the case is viewed from the plaintiff's or the defendant's standpoint.

Under the back pay rule directors or officers of corporations cannot recover for services rendered the corporation unless upon a contract or resolution passed by the corporation or by a vote of the board of directors in which they take no part, or upon some provisions made for such compensation in the charter or by-laws, all of which must be before such services are rendered.

There is not shown on any certain date prior to January 7, 1919, any vote by the board of trustees or directors of the Pacific Cold Storage Company (in which Charles Richardson took no part) to allow defendant a five per cent commission on the $500,000.00 liquidated and returned by the trustees as a reduction of the capital stock before September 30, 1918, and so the plaintiff was entitled to recover the amount so appropriated by defendant amounting to $2.50 a share or $150.00 on the third cause of action and $1,995.00 on the fourth.

It is doubtful whether the board of trustees had the power to pass such a resolution if the defendant was at the same time to receive a salary of $1,000.00 a month. If it was legal for the defendant to receive a five per cent commission for returning the $500,000.00 to the stockholders it was illegal for him to receive the salary. If it was legal for him to receive the salary it was illegal for him to receive the five per cent commission. The trustees of a corpora-

tion cannot make a present. It is not for the courts to choose for the defendant which he would accept in order to legalize an illegal act. If such resolution had been in advance of September, 1918, the defendant still had to answer the question "The lady or the tiger?" If he had taken both justice would have made him disgorge the five per cent commission.

The plaintiff is correct morally and legally but for the sake of argument let us adopt the theory of the defendant. Under the *ex post facto* resolution of January 7, 1919, defendant, a skilful and ingenious lawyer, endeavored to incorporate correspondence between himself and the advisory board dating back to July, 1918, and the agreement was in the letter from Richardson to such board in the following language: "I will devote my time to the liquidation of the company for a commission of five per cent on the amounts returned to the shareholders, my salary to cease on September 30, 1918." Suppose the board could make a *nunc pro tunc* agreement of this sort, would anybody other than the defendant himself construe the language as meaning that Richardson was to get $25,000.00 in addition to his salary of $1,000.00 for the work done in September, 1918? If "self does not the wavering balance shake," anyone would say that even by the terms of Richardson's own resolution it was meant that his salary would compensate him for his services through September, 1918, and after that he was to be compensated by a commission of five per cent on the amounts returned to the shareholders.

The court's instructions on this phase of the case were:

"In order for him (the defendant) to keep from paying the $2.50 a share (the commission paid the defendant on the $500,000 stock reduced and return in September, 1918) the defendant must show to you by the fair preponderance of the evidence that the service performed by him in the liquidation of this concern was five per cent of the amount returned to the stockholders and the salary paid to the 31st of September, 1918, if you believe by a fair preponderance of the evidence that it was worth that, the plaintiff cannot recover; but if you believe it was not worth that and that it was worth a less sum, then you must find for the plaintiff in such sum as you believe he ought to be credited on that stock.

"Now, in considering the value of the services you should take into consideration the distribution or liquidation of all of the assets. It might be very easy and of little, comparatively little labor or service to distribute the first part, the first $500,000, and then the after $500,000 might be worth a great deal more. So that in considering the compensation and reasonable value you should take into consideration the entire estate in the liquidation.' (See Assignment of Error 30.)

And again:

"In view of the inquiry made and exceptions taken, you are instructed that if you should find from all the evidence that the defendant should not have been paid 5 per cent on the $500,000 that was distributed prior to the actual adoption of the resolution in January and checks sent out while he was receiving salary and believe that he should have simply received the

salary, then you find for the plaintiff for $2.50 a share on his stock; and if you should find then that for the balance of the liquidation 5 per cent was reasonable compensation then that is all you can find for him; but if you are not satisfied that is sufficient, if you believe that the defendant should have been paid less than 5 per cent for the $500,000 distributed prior to the actual adoption of the resolution, then you should find what per cent he should have been paid in addition to the $12,000 if any, and if you find any why then you will compute what is the balance of the per cent that you feel was overpaid to him, what amount to apply to the stock owned by the plaintiff, and find your verdict for that amount.' (See Assignment of Error 36).

It will be observed by these instructions that the court hopelessly intermingled his instructions as to the $25,000.00 exacted by the defendant for the $500,000.00 reduction of capital stock in September, 1918, with his compensation received for the liquidation of the rest of the assets of the company. We were entitled to the clean-cut instructions set forth in Assignment of Error 25.

The court also injects into both of these instructions the question whether the defendant's services were reasonably worth the $25,000.00 which is clearly erroneous according to text-book and case law.

The plaintiff asked for the following instruction:

"The law is that defendant Richardson while acting as trustee cannot receive any back pay for past services, and if any resolution was passed by the Board of Trustees in January,

1919, giving the defendant Richardson five per cent commission for converting the assets of the Pacific Cold Storage Company into money and liquidating the affairs of the corporation, the defendant cannot recover for any past services or any past liquidation of assets and can only recover for such sums, if any, as he liquidated after January 7, 1919." (See Assignment of Error 26).

As aforesaid, a court or jury could not by the most severe stretch of the imagination construe the vague and uncertain testimony of Richardson, Moore, Davis and Stacy as proving by a scintilla of evidence that there was any legal resolution prior to January 7, 1919, giving the defendant the compensation therein set forth. In order for the defendant's five per cent commission to be legal it would be necessary that there should be a legal resolution of the board of trustees allowing same in substantially the same terms as the resolution of January 7, 1919, passed prior to November, 1917; and it will be observed that there was not even any clear cut agreement as to the defendant's compensation formulated by the defendant himself until July 12, 1918, and he did not even then present such agreement to the legally constituted board of trustees of the Pacific Cold Storage Company but only to this advisory board having no recognized legal existence.

If we were not entitled to the instruction shown in Assignment of Error 26 we were certainly entitled to the one requested according to Assignmnt of Error 27 and being in the following language:

"You are instructed that the trustees and officers of the Pacific Cold Storage Company such as its president, vice-president, secretary, treasurer, etc., presumptively serve without compensation, and they are entitled to no compensation for performing the usual and ordinary duties pertaining to the office, in the absence of some express provision therefor by statute, charter, or by-laws, or by an agreement to that effect, and unless such provision or agreement was made and entered into before the services were rendered."

Instead of this instruction the court gave the ones referred to above and the one set forth in Assignment of Error 33 in the following language:

"You have the right to consider in passing upon the reasonableness of the services all ideas and all expressed conclusions of stockholders and other interested parties upon the same relations that the plaintiff understood his. You have a right to consider what the majority stockholders felt was reasonable compensation. You have a right to consider what the witnesses testified who were stockholders what they thought to be reasonable compensation."

This instruction was wrong for several reasons. It was immaterial what one or a majority of the stockholders thought was a reasonable sum to be paid defendant. The mere fact that they were stockholders would not qualify them as experts. If they were not experts their decision to give Richardson money could not affect Denman or any other dissenting stockholder. They could not be generous with somebody else's money.

The court also gave the following instructions:

> "If you are satisfied that the compensation is excessive then you can assess it to him—you should give the defendant such credit as he ought to have and find for the plaintiff for the portion that would go to his stock."

and

> "After you have voted upon that you will find the amount that you feel that he (the plaintiff) ought to have—that proportion of the per cent that he would have received if the defendant had not received the compensation which he did, and in determining what the services were reasonably worth you should take into consideration all of the evidence and what this advisory committee thought and what their testimony here shows in relation to that, and likewise the plaintiff's testimony as to what he thought reasonable benefits."

(See Assignments of Error 34 and 35).

The last instruction is so glaring that it is hardly necessary to call it to the court's attention. What relevancy in law is the reasonableness of the value of defendant's services in this case? If relevant, what authority has a court or jury to consider the "thoughts" of an advisory committee having no legal existence in order to determine the value of defendant's services?

MILLER NOT ESTOPPED FROM ASSERTING HIS RIGHT

In the first and third affirmative defenses of defendant's answer he plead in substance that Charles A. Miller, the assignor to plaintiff of the fourth cause

of action, was a trustee of the Pacific Cold Storage Company and seconded the resolution of January 7, 1919, allowing Charles Richardson the five per cent. commission and he was therefore estopped from asserting any right to such five per cent commission paid to the defendant.

The minutes showed that Miller seconded the said resolution of January 7th and plaintiff offered to prove that this resolution had the correspondence already incorporated in it and was brought there by Mr. Richardson already typewritten, and that Miller did not know that Mr. Richardson was getting $1,000 a month or the two and one-half per cent commission prior to that time and that Miller was taken by surprise when he seconded the resolution, and the Court excluded the evidence and said: "I do not think that a person may be a party to a situation such as is recited in this resolution referring to the correspondence which appears in the minutes, and take affirmative action with relation to its adoption and having the other party proceed and act upon it and then afterwards say that he did not understand it. They (Denman and Miller) cannot have that issue presented in a collateral fashion." (See Assignments of Error 7 and 8 and Trans. pp. 122-123.)

The court again said: "He (Miller) is estopped —the resolution estops him from now questioning it in this proceeding. If he had an equitable right to have that set aside that should have been done, but he could not do it in this proceeding. The equity and legal remedies may not be blended in the Federal

court. That is primary doctrine. The plaintiff in this case is estopped from claiming anything under the Miller shares of stock so far as the five per cent commission is concerned. (Assignments of Error 7 and 8, Trans. p. 126.)

It will be observed that the court threw out all of Miller's claim for the five per cent commission, both that taken by the defendant for the return of the $500,000.00 reduction of capital stock in September, 1918, and the rest of the capital return. The court does this in face of the fact that the resolution of January 7, 1919, provided "That I (Richardson) will devote my time to the liquidation of the company for a commission of five per cent on the amounts returned to the shareholders, my salary to cease on September 30, 1918." Any reasonable man would interpret the resolution as meaning that Richardson would be compensated for his services by the salary of $1,000.00 a month until September 30, 1918, and thenceforth was to be paid on the commission basis. So that even on defendant's own theory the court erred in holding Miller was estopped from recovering the money misappropriated by defendant for the return of the $500,000.00 reduction of capital stock in September, 1918, and we believe that the following authority will convince this court that there was error also in holding that Miller was estopped from asserting his right against the defendant for the refunding of the commission exacted by him for the liquilation of the rest of the capital return.

In Pomeroy and other authorities on estoppel there are given three kinds of estoppels, namely, by matter of record, by matter in writing and by matter in *pais*. (Vol. 2 *Pomeroy's Equity Jurisprudence,* p. 1415).

This case does not fall under the two first kinds and so must be an estoppel in *pais*.

Pomeroy further states:

"Although the facts from which equitable estoppels arise are all matters in *pais* as distinguished from records and deeds, yet the whole doctrine is an expansion of and addition to the original legal estoppels in *pais,* and embraces rules unknown to the law when Lord Coke wrote. * * * The doctrine of equitable estoppel is preeminently the creature of equity. It has, however, been incorporated into the law and is constantly employed by courts of law at the present day in the decision of legal controversies. Preserving its original character, and depending upon equitable principles, it is administered in the same manner, and in conformity with the same rules, by the courts both of law and of equty, so that the decisions of either class of tribunals may be quoted as authorities in the subsequent discussion." (2 Pomeroy Equitable Jurisprudence, pp. 1416, 1417, 1418.)

Pomeroy gives the following definition as covering all phases and applications of the doctrine:

"Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely pre-

cluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract, or of remedy." (Vol. 2, Pomeroy, pp. 1421, 1422).

The author then gives the following essential elements which must enter into and form a part of an equitable estoppel in all of its phases and applications: 1. There must be conduct—acts, language, or silence—amounting to a representation or a concealment of material facts. 2. These facts must be known to the party estopped at the time of his said conduct or at least the circumstances must be such that knowledge of them is necessarily imputed to him. 3. The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel, at the time when such conduct was done, and at the time when it was acted upon by him. 4. The conduct must be done with the intention, or at least with the expectation, that it will be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be so acted upon. 5. The conduct must be relied upon by the other party, and thus relying, he must be led to act upon it. 6. He must, in fact, act upon it in such a manner as to change his position for the worse.

See *Centennial Mining Co. v. Juah County* (Utah) 62 Pac. 1024, which gives substantially the same elements of estoppel as above.

Let us examine the facts in the light of these elements.

The first element is certainly lacking. There was no conduct on the part of Miller amounting to a representation or concealment of material facts. The plaintiff offered to show that there was a ready made typewritten resolution for the five per cent commission brought to the meeting of the board of trustees by the defendant himself.

The second element is lacking. We offered to prove that Miller did not know Richardson was getting the $1,000.00 a month salary nor the two and one-half per cent commission prior to that time and was taken by surprise when he seconded the resolution. Acts and declarations based on innocent mistakes as to legal rights will not estop one to assert the same. 16 *Cyc.* 733; *Mullen v. Shrewsbury,* (W. Va.) 55 S. E. 736; *Kent v. Williams,* (Cal.) 79 Pac. 527; *Smith v. Morrell,* (Colo.) 55 Pac. 824; *Southern Etc. Mining Co. v. Fuller,* (Ga.) 43 S. E. 64; *Bushnell v. Simpson,* 51 Pac. 1080. Miller at the time he voted for this resolution did not know that Richardson was receiving a salary of $1,000.00 a month and two and one-half per cent commission on dividends during practically all of the period for which he was being paid the five per cent commission called for in the resolution, and so would have the right to reconsider

his action and recover from Richardson the sums misappropriated from his own stock.

The third element is lacking. The truth concerning the resolution for the five per cent commission and all the facts in connection with it were certainly not unknown but known by Richardson both at the time of the passage of the resolution on January 7th and at the time of the taking of the commission by Richardson.

The fifth element is lacking. Richardson did not misappropriate this money because of his reliance upon the conduct of Miller, but Miller was rather a tool in his hands. To entitle Richardson to plead estoppel he must show that he was misled by the action of Miller. Thus, in *Kent v. Williams,* 79 Pac. 527, it was said: "A party will not be allowed to acquire property through error of fact or law where he was not misled."

The sixth element is lacking. There is no estoppel unless the party claiming it relied upon the conduct of the other party, was induced by it to act, and, thus relying and induced, did something whereby he will be prejudiced, if the plaintiff is permitted to assert his legal right. *Stevens v. Blood* (Vt.) 96 Atl. 697. It is difficult to see how the defendant has changed his position for the worse. He has had the use of $52,500.00 and if he gets it for six per cent interest he will be paying a lower rate than the banks now allow the average man. If, however, the court should allow no interest on plaintiffs re-

covery of his share of the money misappropriated, the defendant would not be in the same but in a better position than the average borrower.

Besides these elements there is another well recognized doctrine of estoppel applicable and that is that estoppel can never be asserted to defend or uphold crime, fraud or misdoing of any character. One reason for this is that under such circumstances the element of good faith is lacking, that being absolutely essential when one relies upon such plea. *Kirby v. V. P. Ry. Co.* (Colo.) 119 Pac. 1042; *in re Schoenfeld,* 190 Fed. 53; *in re Druil & Co.*, 205 Fed. 573; *Royce v. Watros,* 73 N. Y. 597; *Dunn v. National Bank of Canton* (S. Dak.) 90 N. E. 1045; *People ex rel v. Edgcomb,* 98 N. Y. S. 965; *C. M. & St. P. R. Co. v. Des Moines U. R. Co.,* 254 U. S. 196 (222); 65 *L. Ed.* 219 (233).

As an illustration of this rule it would not lie in the mouth of a hold-up man to say that his victim could not bring suit against him for the recovery of his ill gotten gains because he had failed to prosecute him for a year or two and he had thereby acquired extravagant habits which it would be impossible for him to shake off after he had disgorged his stolen funds.

Or to express this rule in the language used in the *Druil* (the Federal) case, "It has never been held that estoppel could be invoked to permit the party asserting it to perpetrate a fraud which would be

the effect in this case. The doctrine of estoppel against estoppel might well be applied to the trustee's plea.16 Cyc. 748."

This rule is a sort of branch of the principle that you must come into equity with clean hands. As seen above, estoppel is of legal origin but with equitable growth and in its modern application is more a creature of equity than of law. So it is absurd for the court to allow the defendant to assert an equitable rule in defense and yet deny the plaintiff the right to assert the corollary of this same rule.

In the *C. M. & St. P. R. Co.* case, the Supreme Court case above cited, the opinion says:

> "It seems to us the court below attributed undue weight to the conduct of the executive officers of the proprietary companies indicating acquiescence in a supposedly changed situation resulting from the amended articles. It would not be surprising if occasionally there was a failure to appreciate fully and accurately the rights and obligations growing out of the trust. But the Messrs. Hubbell, because of their fiduciary relation, are estopped from laying hold of the incautious, negligent, or mistaken acts of the executive officers as a ground on which to build up a profit or advantage for themselves at the expense of the proprietary roads which were their *cestuis que trustent.*"

And again on page 224 of the official reports and 234 of Law Ed., the court says:

> "But, because of their fiduciary character, they are debarred in equity from trafficking in the trust property in this or any other way,

without the express consent of the beneficiaries, they would be bound to account for any profit that might accrue; and any seeming consent on the part of the beneficiaries to waive such profit in advance, not amounting to a termination of the fiduciary relation, is, in its nature, revocable."

The facts of the last cited case are on all fours with the instant case. Richardson stood in a fiduciary relation to Miller. Miller did not know that the back pay resolution of January 7, 1919, was calling for a duplication of the payment for Richardson's services from November, 1917, to September 30, 1918, and he did not know that this resolution was illegal and he was taken by surprise, and so Charles Richardson, on account of his fiduciary relation, is estopped from laying hold of the ignorance of fact and law of Miller. Millers' consent was more apparent than real and it did not amount to a termination of the trust relation between Richardson and himself and was therefore revocable.

The court says that if the plaintiff had an equitable right to have the resolution seconded by Miller set aside that should have been done, but he could not do it in this proceeding. "The equity and legal remedies may not be blended in the Federal court." We believe that we have answerd the court in our argument on estoppel. A man who asserts an equitable doctrine in defense must abide by all of its consequences. He who lives by the sword must perish by the sword. If, however, the court is not answered by the above argument he certainly would

be by the fundamental principles underlying the nature of the action for money had and received. The action of money had and received is of equitable origin proceeding from the maxim *ex aequo et bono* to the end of affording a remedy for the recovery of money in the possession of one which in good conscience belongs to another. It is recognized to be a flexible form of procedure commingling and administering equitable doctrines as well as those of the law. See *Early v. Atchison Etc. Ry. Co.* (Mo.) 149 S. W. 1170; *Todd v. Bettingen* (Minn.) 124 N. W. 443; *Cole v. Bates* (Mass.) 72 N. E. 333; *Knowles v. Sullivan,* 182 Mass. 318; 65 N. E. 389; *Henchey v. Henchey* (Mass.) 44 N. E. 1075; *Deal v. Mississippi Co. Bts.,* 79 Mo. App. 262; *Hall v. Marsten,* 72 Mass. 575.

This is an action for money had and received brought in Washington, a code state, so the following language in *Todd v. Bettingen* is peculiarly applicable to this case:

> "The charge and defense in this kind of action (an action for money had and received) are both granted on the truth and equity and circumstances of the case. The difficulty encountered at common law that a court of law may in this form of action go too far in the doctrine of equitable rights, is not presented in jurisdictions which like this are governed by the so-called Code Pleading. That system of pleading is designed to administer justice unhampered by the artificial distinctions and technicalities of the mere form of action or by the observance of strict demarkation between law and equity."

The fundamental principle is that under the doctrine of estoppel all of the facts and circumstances connected therewith are admissible in evidence. Therefore, the telegram of the defendant relative to the resolution of January 7, 1919, giving his understanding and meaning of same would certainly be admissible in evidence. The court would not give his reasons for excluding this telegram but the only conceivable reason would be on the theory of not allowing a collateral attack of the resolution. The wire in question was from Pasadena, California, dated February 14, 1919, to B. A. Moore, in the following language, to-wit:

"B. A. Moore,
Pacific Cold Storage Company,
Tacoma, Washington.

Your telegram a surprise. Wire or write me fully of any other stockholders connected with the matter and who they are. It was never my intention to charge him any part of my commission or anyone else connected with company. If Davis has not left ask him to get all information possible and write

CHARLES RICHARDSON."

(See Assignment of Error 22).

From this telegram the inference is clear that the defendant did not charge any of the officers connected with the company his commission except Denman and Miller. So that Moore and Davis voted for a resolution on January 7, 1919, whereby they were to be retained by the company and receive a salary during the liquidation period, and in addi-

tion thereto were not to be charged the five per cent commission on their stock, which all of the other stockholders had to bear. Under the strict rule that trustees of a corporation cannot vote for a resolution whereby they will profit, Moore and Davis were clearly disqualified from voting on this resolution. So the telegram was admissible from every angle and the court erred in excluding it.

GIST OF THE CASE

The gist of the case is that the defendant Richardson, while acting as trustee and president of the Pacific Cold Storage Company without any previous authorization of either the board of trustees or stockholders of the company under the guise of a salary misappropriated $18,000.00, and while acting as trustee of the company without any preceding authority so to do by either the trustees or stockholders, under the guise of a commission for liquidating the company misappropriated $52,500.00. The defendant, in a vain endeavor to disguise these facts, has been Proteus like in his pleadings and evidence but fortunately the action of money had and received is an equitable, flexible and tenacious action and will never release a man until he has rendered unto Caesar the things that are Caesar's.

Respectfully submitted

G. P. Fishburne,
A. H. Denman,
Attorneys for Plaintiff in Error.

In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 3993

FREDERICK L. DENMAN,
Plaintiff in Error

vs.

CHARLES RICHARDSON,
Defendant in Error

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE JEREMIAH NETERER, JUDGE

BRIEF OF DEFENDANT IN ERROR

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BRIEF OF DEFENDANT IN ERROR

This action was originally commenced in the Superior Court of Pierce County, Washington, by Frederick L. Denman, and Frederick L. Denman as agent and attorney in fact for Charles A. Miller, A. H. Denman, Percey E. Radley, J. H. Wrentmore,

W. Boyd Shannon, J. Hunter Ramsey, W. Archibald, F. C. Hewson and Thomas Larsen, as plaintiffs versus Charles Richardson as defendant. In the original complaint it was alleged that the Pacific Cold Storage Company was a corporation organized under the laws of the State of Washington, with a capital stock of $1,000,000, divided into 10,000 shares of the par value of $100 each, and "that the following named parties are now, and at all times herein mentioned were the lawful owners of the number of shares set opposite their respective names, to-wit:

Charls A. Miller	798 shares
A. H. Denman	40 shares
Percey E. Radley and J. H. Wrentmore	125 shares
W. Boyd Shannon	50 shares
J. Hunter Ramsey	40 shares
W. Archibald	186 shares
F. C. Hewson	1 share
Thomas Larsen	25 shares
Frederick L. Denman	60 shares

(Trans. p. 5.)

The cause was removed to the United States District Court for the Western District of Washington, Southern Division on the ground of diversity of citizenship. Subsequently A. H. Denman, Percy E. Radley, J. H. Wrentmore, W. Boyd Shannon,

J. Hunter Ramsey, W. Archibald, F. C. Hewson and Thomas Larsen were dismissed by the plaintiff. Seven amended complaints were filed by the plaintiff. The defendant demurred to each complaint upon the grounds: (1) That there is a defect of parties plaintiff; (2) that there is a defect of parties defendant; (3) that several causes of action have been improperly united; (4) that the complaint does not state facts sufficient to constitute a cause of action; (5) that the action was not commenced within the time limited by law. (Trans. p. 27.)

Finally the plaintiff filed the seventh amended complaint, which is the complaint upon which the action was tried in the court below. (Trans. p. 14.) To each cause of action the defendant filed demurrers upon the grounds above stated. The court will observe that the plaintiffs named in the original complaint were all withdrawn with the exception of Frederick L. Denman, who bases his right of recovery by reason of his ownership of sixty shares of the capital stock of the Pacific Cold Storage Company and by reason of his acquisition, after the commencement of said action, of the 798 shares of stock in said company owned at the time of the commencement of the action by Charles A. Miller.

In the seventh amended complaint, the plaintiff sets forth four causes of action. For convenience, plaintiff in error will be referred to as the "plaintiff," and the defendant in error will be referred to as the "defendant."

In the first and third causes of action the plaintiff claims a right to recover based upon his ownership of sixty shares of stock in the Pacific Cold Storage Company since the month of April, 1912. As to the second and fourth causes of action, the plaintiff bases his claim upon an assignment by Charles A. Miller, the holder of 798 shares of the capital stock of the Pacific Cold Storage Company. The assignment of Miller to the plaintiff is dated September 10, 1919, subsequent to the commencement of this action.

(a) As to the first cause of action, plaintiff alleges that "in each year commencing with the year 1912 and ending with the year 1918, the defendant, without authority from said corporation, its trustees or its stockholders, and while acting as trustee and president, wrongfully and unlawfully misappropriated and converted to his own use from said accumulated funds and undivided profits an amount equal to 2½ per cent of the amount paid to said

stockholders as dividends," and then sets forth that such dividends and the 2½ per cent of the dividends were paid in the month of January of each year from the year 1912 to 1918 inclusive. The plaintiff claims that his pro rata share, by virtue of his ownership of the sixty shares of stock in the corporation amounts to the sum of $108.00.

(b) The second cause of action is the same as the first except that the plaintiff claims the right to recover through the assignment of 798 shares of stock of Charles A. Miller on the 10th of September, 1919, and claims 2½ per cent by virtue of being assignee of Miller of certain shares of stock. He alleges that Miller acquired "30 shares August 15, 1911; 100 shares December 9, 1911; 200 shares April 7, 1912; 100 shares March 19, 1913; 100 shares April 29, 1913; 100 shares October 17, 1913; 70 shares March 1914; 100 shares March 1914; 100 shares August 10, 1915; 158 shares March 1917. That Miller sold 80 shares in March, 1912; 100 shares in March 1913; 15 shares in March, 1914; 15 shares in October, 1916; 20 shares in March, 1917; 25 shares in March, 1917; and 5 shares in April, 1917." That by reason of the Miller stock he is entitled to $1436.40 out of the 2½ per cent which the defendant received from the corporation from time to time as the dividends were declared.

(c) As to the third cause of action the plaintiff alleges that the defendant received from the corporation $52,500 as follows: January, 1919, $25,000; June, 1919, $25,000, and January, 1920, $2,500; and that by virtue of the ownership of the 60 shares of stock above mentioned he is entitled to $315.00, or $5.25 per share.

(d) As to the fourth cause of action plaintiff claims recovery of $4,189.50, or $5.25 per share by virtue of the 798 shares of the Miller stock and by virtue of the assignment of September 10, 1919, from Miller to the plaintiff. He does not base any claim for recovery as to the fourth cause of action upon his ownership of stock but by reason of the ownership of the stock by Miller and the subsequent assignment of said stock by Miller to the plaintiff.

After the demurrer of the defendant had been overruled, the defendant filed its amended answer to the seventh amended complaint, denying the allegations of the complaint generally and setting up affirmative defenses as follows:

For a further and first affirmative defense to the seventh amended complaint of the plaintiff, this defendant alleges:

I

That the Pacific Cold Storage Company is a corporation organized under the laws of the State of Washington with its principal place of business in the city of Tacoma, Pierce County, Washington; that said corporation was organized on or about the 8th of April, 1897, with a capital stock of $150,000; that subsequently the capital stock of said corporation was increased to $500,000 and later increased to $1,000,000, consisting of 10,000 shares of the par value of $100 each; that at the time of the first and second increase of the capital stock of the corporation, a large percentage of the capital stock of said corporation was acquired, held and owned by residents of Glasgow, Scotland, and other places in Great Britain; that more than 90 per cent of the capital stock of said corporation was owned and held by residents of Great Britain long prior to June 1, 1911, and down to the date of the dissolution of the corporation.

II

That by reason of the fact that such a large percentage of the capital stock of the corporation was held in Great Britain, an advisory committee was

appointed by the stockholders residing in Great Britain with the consent and approval of the defendant and of all the stockholders of said corporation residing in the United States; that the creation of said committee was the joint action of all of the stockholders of the corporation. This defendant alleges upon information and belief that the advisory committee was created by a written agreement of the stockholders at that time residing in Great Britain and that the stockholders residing in the United States verbally assented thereto and acquiesced herein; that in any event, whether said agreement by the foreign stockholders was in writing, nevertheless, the advisory committee was appointed by the verbal consent of the stockholders residing in Great Britain; that the defendant has no copy of such writing and does not know the date thereof but that said advisory committee was appointed about the time of the first increase of the capital stock of the corporation and continued to be appointed and maintained down to the date of the dissolution of the corporation as hereinafter stated; that the appointment of the advisory committee for the stockholders in Great Britain was continuously verbally approved by the stockholders in Great Britain and in the United States; that the creation,

maintenance and continuance of said advisory committee was the result of the unanimous action of all of the stockholders of the corporation verbally expressed from time to time at the annual meetings of the stockholders in the city of Seattle and at the meeting of the stockholders approximately the same time residing in Great Britain. That no resolution appears upon the minutes of the meetings of the trustees or stockholders of the corporation but that affirmative action was taken at such meetings verbally; that all important business affecting the affairs of the corporation and its operations was submitted to the advisory committee for its approval; that said advisory committee by the consent of each and all of the stockholders of the corporation verbally given was clothed with powers to enable it to control and regulate and dictate the policies of the corporation, subject only to the approval of the board of trustees of the corporation; that such action by the board of trustees of the corporation was taken at the annual meeting of the stockholders and at the first meeting of the board of trustees after each stockholders' meeting but not spread upon the minutes; that it was agreed by each and all of the stockholders of the corporation that such advisory committee should have the same pow-

ers with regard to the control of the management of the affairs of the corporation as a board of trustees or directors would ordinarily possess and exercise; that such action was verbal but was the action of the stockholders individually and the action of the board of trustees taken at regular meetings of the board of trustees; that full and complete statements and reports of all of the important business of the corporation was submitted to such advisory committee for its approval before action was taken thereon and that the officers of the company continuously and uniformly complied with the requests of such advisory committee in the conduct and management of the affairs of the corporation at all times. That Mr. David Inglis was the secretary of said advisory committee from the date of its creation to the date of the dissolution of the corporation, and that all statements, audits and reports were sent to the advisory committee in care of the said David Inglis. That the correspondence between the said David Inglis and the corporation has been submitted to the plaintiff, that is to say copies of letters from the corporation to Inglis have been submitted to the plaintiff and the original letters from Inglis to the corporation touching such matters have also been submitted to the plaintiff.

III

That from the year 1901 until the date of the dissolution of the corporation, on or about the 3d of June, 1919, the defendant Charles Richardson, was the president and a member of the board of trustees of said corporation and had active charge and management as such president of the affairs of said corporation, performing the duties prescribed by the by-laws of the corporation; that for several years prior to January 1, 1911, the said defendant as such president, drew a salary of $1,000 per month; that on or about the 14th day of December, 1910, the defendant communicated with the advisory committee and indicated that he was not satisfied with the salary that he had been drawing as such president and requested some additional compensation: that on the 13th of January, 1911, the said advisory committee in answer to the defendant's letter of December 14, 1910, wrote the defendant as follows:

"As regard your own remuneration—Since you raised the point a short time ago, the board have had the matter before them, and it was their intention that they would shortly have made you a proposal that you be allowed by way of increased emolument, and annual commission or bonus on the total

amount of dividend paid to the shareholders in each year. Such bonus, they propose should be at the rate of 2½ per cent beginning with the current year.

"They trust that you will view these proposals as a favorable settlement."

That the defendant accepted such proposal and agreed to accept by way of additional compensation for his services a sum from the corporation equal to 2½ per cent upon the amount of the annual dividends paid by the corporation to its shareholders; that the arrangement thus made between the advisory committee and the defendant was communicated by the defendant to the board of trustees of the corporation and was in all things approved by the trustees of the corporation annually at the various meetings of the board of trustees and particularly at the first meeting after the annual stockholders' meeting; that no record of the resolution approving such arrangement was placed upon the minutes but that the resolution was adopted by the unanimous vote of the trustees at such meetings verbally; that such arrangement for additional compensation in the amount above stated was thereafter with the consent and approval of the board of trustees of the company, continued until January, 1918, covering the intervening years from January, 1,

1911, to December 31, 1917, inclusive, and that said additional sum was equal to 2½ per cent of the amount of the dividends declared and paid to the stockholders and was paid to the defendant on or before the first of January of each year of said period and at the meeting of the board of trustees held about the time the payment was made, the matter was brought before the board and continuously adopted by verbal action of the board but no record was made thereof upon the minutes.

IV

That all dividends declared by the corporation were paid by the corporation to the shareholders in the amounts of the dividends so declared; that no portion of said 2½ per cent was deducted from the dividends declared to the shareholders, that the shareholders received the full amount of the dividends annually declared during said period but that said 2½ per cent additional emolument or compensation to defendant's salary was paid by the corporation and that the amounts so paid were measured by the computation of 2½ per cent upon the annual dividends declared and paid to the shareholders; and that such payment of 2½ per cent was

ratified and approved by the action of the board of trustees of the corporation and by the stockholders of said corporation; that the authorization of the payment of said additional compensation of 2½ per cent was authorized by the board of trustees, by the advisory committee and by the stockholders prior to the several dates upon which the same were paid to the defendant as such additional compensation for his services as president of the corporation; that the arrangement for the additional compensation hereinbefore set forth and the action taken by the board of trustees thereon as stated in the preceding paragraphs is hereby referred to and made a part of this paragraph.

V

That at the time such arrangement for such additional compensation of 2½ per cent was made, and continuously thereafter until about the first of June, 1918, the plaintiff Frederick L. Denman was the secretary and auditor of the corporation and that it was his duty as such auditor and secretary to keep the record and account books of the corporation and to make up vouchers explanatory of all disbursements; that from year to year as such addi-

tional compensation was paid by the corporation to the defendant, the said plaintiff, Frederick L. Denman, made up such vouchers; that the explanation upon the vouchers for such additional compensation was substantially as follows:

"Extra on 2½ per cent of total dividend as per order on file."

together with the amount so paid to the defendant; that the order on file referred to in vouchers by the said plaintiff, Frederick L. Denman, was the agreement or order of the said advisory committee; that each year the account books of the corporation were audited and a report of such audit made and in such audits so annually made the 2½ per cent additional compensation was included and explained; that such audits were submitted to the advisory board and to the stockholders represented by the advisory board and were approved by them and that such audits were submitted to the board of trustees annually and to the stockholders' meetings in the city of Tacoma, and were approved by the board of trustees and by the stockholders, and that the checks drawn by the corporation in payment of said additional compensation were signed by the said plaintiff, Frederick L. Denman; that the payment of such additional compensation was authorized by

the board of trustees of the corporation and by the stockholders and subsequently ratified by the board of trustees and by the stockholders and continued from the time the arrangement was put into effect in 1911 down to and including the year 1917 without the objection or protest or criticism of any stockholder or officer and during a considerable portion of the period the said Frederick L. Denman was one of the trustees of the said corporation. That the audits referred to in this paragraph were in writing and were prepared usually by Eli Moorhouse & Co., chartered accountants and that such reports were then submitted to the plaintiff. That on January 13, 1912, the defendant wrote the following letter to Frederick L. Denman:

"Tacoma, Wash., Jan. 13, 1912.

"F. L. Denman, Auditor,
Pacific Cold Storage Company,
Tacoma, Wash.

"Dear Sir:

"By virtue of a resolution passed by advisory board at its annual meeting in January, 1911, I was voted two and one-half (2½) per cent as a bonus on all dividends declared, in addition to my salary.

"You will therefore issue me a check for two and one-half per cent of the dividend in addition to my

regular dividend.

"Yours truly,
CHARLES RICHARDSON,
President."

That remittance statement No. 19982 contained a check in favor of Charles Richardson for $2500 which was entered in the Pacific Cold Storage Company's audited voucher record at page 23, under date of January 13, 1912, and was charged to office expense. In like manner and in similar vouchers defendant was paid $2500 in 1913; $2500 in 1914, $1500 in 1915, $2000 in 1916, $2000 in 1917 and $5000 in 1918. These payments are all shown on the books of the company and are included in the annual reports prepared by its auditor who was at that time the plaintiff, and by chartered accountants. On page 232 of the record of trustees' meetings, dated January 7, 1913, the following resolution was made:

"Upon motion of Mr. Davis, seconded by Mr. Denman, (plaintiff), it was unanimously carried that the report of the president covering the year ending September 30, 1912, together with the statement of assets and liabilities and profit and loss account for the same period, be approved and adopted."

The payment of $2500 in 1912 was a part of the profit and loss account. Again on page 243 under

date of January 15, 1914, the following record was made:

"Reports of the officers for the year ending September 30, 1913, were approved, accepted and placed on file."

These reports included the annual statement of accounts, including the payment to Mr. Richardson of $2500 in 1913. As to the years 1914 and 1915, no formal action was recorded but the action was taken as hereinbefore stated. On May 31, 1917, the following record appears:

"Moved, seconded and unanimously carried that the accounts as presented by the chartered auditors, Moorhouse & Co., be approved, and the acts of the board of trustees were also approved."

This refers to the accounts of 1916 including the $2000 paid Mr. Richardson that year. At the annual meeting of the stockholders on May 31, 1918, the following resolution was adopted:

"Resolved: That the annual accounts as audited by Eli Moorhouse & Company, chartered accountants, for the year ending September 30, 1917, now on file, be and the same are confirmed and approved."

These annual accounts included $2000 paid Mr. Richardson in 1917. But at all of the meetings of

the trustees declaring dividends the arrangement as to the 2½ per cent additional compensation was unanimously approved, although not spread upon the minutes in all cases.

VI

That about two years prior to the 31st of May, 1918, the defendant submitted to the advisory board a suggestion of liquidating the corporation and at such time suggested that if it were finally decided to liquidate the corporation, defendant thought that he should be paid a commission upon the amount of money realized from the sale of the assets and their conversion into money and further indicated to said advisory board that he considered five per cent upon the amount so realized as a reasonable and just compensation; that the advisory board authorized and approved the payment of said commission of 5 per cent and that said agreement so made between the advisory board and defendant was thereafter ratified and approved by the board of trustees of the corporation and by the stockholders thereof; that the approval herein referred to is set forth in the exhibit attached to the answer. That at the meeting of the stockholders of the cor-

poration held on the 31st of May, 1918, the following resolution was unanimously adopted:

"WHEREAS, it is desired by the stockholders that the company should be liquidated and all of its assets sold and that a return of the capital be made as speedily as possible,

"THEREFORE BE IT RESOLVED, That the officers of this company are directed to sell and dispose of all of the assets of the company as rapidly as possible and wind up its affairs returning to the shareholders the amount realized therefor."

That said corporation was not, however, dissolved until the 2nd of June, 1919, when an order was duly entered in the Superior Court of Pierce County, Washington, dissolving and disincorporating said company. That on or about the 31st of May, 1918, the defendant submitted to the advisory board a proposal to convert the assets of the company into money and to devote his time to the liquidation of the affairs of the corporation for a commission of five per cent on the amounts returned to the shareholders; that later and on July 12, 1918, the defendant again submitted a written proposal to the advisory board, in which he stated that he would devote his time to the liquidation of the company for a commission of 5 per cent on the amounts returned to the shareholders, his salary to cease

on September 30, 1918; that out of this commission he would pay all commissions and attorneys' fees that he found necessary to be paid in winding up the company, excepting amounts paid in connection with the sale of the "Elihu Thompson," a vessel belonging to the corporation, and that he would retain the services of R. J. Davis and B. A. Moore for as short a time as possible, who should be paid their present salaries by the corporation. He further stated to the advisory board that it was not his intention to engage in any other business until the company's affairs had been wound up and complete returns made to the shareholders; that this would preclude him from earning anything else during such time; that he hoped to liquidate the company within a year but that contingencies might arise that would require his services for a longer period; that while it should be optional with him, he expected to pay out of his commission of 5 per cent any other officers of the corporation who might be of assistance to him in closing its affairs; that on the 18th of August, 1918, the advisory board agreed to said proposal for remuneration as stated in defendant's letter of July 12th and later and on the 21st day of August, 1918, said proposal was further accepted by letter from the advisory board; that

immediately upon the receipt of said cablegram or wire from the advisory board the proposed arrangement by which the defendant should receive a commission of five per cent upon the amounts returned to the shareholders was submitted to the board of trustees of the corporation and the same was approved by them and accepted by the defendant and the agreement consummated; that later, and on the 7th of January, 1918, the arrangement for the payment of said commission of five per cent to the defendant was again brought before the board of trustees at a meeting of such board held on said date, and a resolution was duly adopted by the unanimous vote of the board of trustees with the exception of the defendant, who did not vote thereon, said resolution being as follows:

"WHEREAS it appears from correspondence between Charles Richardson and the advisory board of Glasgow, as shown in a letter from Mr. Richardson of July 12, 1918, and cable in reply of August 18, 1918, and letter of confirmation of August 21, 1918, that an agreement as to compensation to Mr. Richardson for his services in winding up the company and disposing of the assets has been reached so far as it affects a large majority of the shares of the company, and

"WHEREAS, it appears that said agreement is fair and just and that such compensation is reasonable,

"THEREFORE BE IT RESOLVED that the offer contained in the letter of Mr. Richardson of July 12, 1918, be, and the same is hereby accepted and the agreement as set forth in the correspondence between Mr. Richardson and the advisory board as herein referred to be, and the same is hereby confirmed and ratified and the officers of this company are authorized and directed to pay the compensation therein named and to fully carry out all of the terms of said agreement."

That the resolutions referred to are set forth in Exhibit A attached to the answer. That the proceedings taken at said meeting of the board of trustees are all found in Exhibit "A" attached to the answer. That the foregoing resolution was offered at said meeting by Mr. Harold Seddon, who moved its adoption, which was seconded by Mr. Charles A. Miller, the owner at that time of 798 shares of the capital stock of the company, being the same Charles Miller named in paragraph II of the of the second and fourth causes of action.

VII

That prior to September 1, 1918, the defendant sold and disposed of a portion of the assets of the corporation and shortly after the first of September, 1918, the corporation declared a dividend by way of

a distribution of the capital assets of the sum of $500,000.00 and the same was paid by the corporation to its stockholders and later, and on or before June 1, 1919, the defendant converted other and additional assets of the corporation into money in the sum of $500,000.00 and the same was distributed by way of a dividend in the distribution of the capital assets of the corporation on or about the 2d of June, 1919, and the same was received by the shareholders and a further dividend was declared and paid in the sum of $50,000, making a total distribution of the capital assets to the stockholders in the sum of $1,050,000.00; that said agreement for the payment of said commission of five per cent was approved by the advisory board and approved by the board of trustees of the corporation prior to its payment and was subsequently ratified by the action of the shareholders; that the payment of said commissions was authorized by the board of trustees; that the large returns to the stockholders was due to the efforts of the defendant in making advantageous sales and disposition of the assets; that if the said defendant had not sold said assets at the time they were sold the returns to the stockholders would have been less by the sum of several hundred thousand dollars; that the defendant procured the

most advantageous and favorable sales of said assets; that the defendant ceased drawing his salary of $1,000.00 per month on the 30th of September, 1918, in accordance with his said agreement; that at the time said agreement was made for the commission of five per cent the defendant did not know and could not know whether his time would be consumed for a period of one year or two or three years; that it might have taken even a longer time than three years had not the defendant been particularly zealous and successful in the prompt sale and disposition of said assets; that the ratification referred to is shown by Exhibit "A" and by the proceedings of the board of trustees held on January 7, 1919.

That on the 31st of May, 1919, the following named persons at a meeting of the stockholders of the corporation were elected trustees, to-wit: Charles Richardson, Harold Seddon, B. A. Moore, E. J. Walsh, Ralph S. Stacey, H. C. Schweinler and R. J. Davis, who duly qualified by taking the usual oath of office and entered upon the performance of their duties as trustees; that on the second day of June, 1919, said corporation was dissolved by an order of the Superior Court of Pierce County, Washington, as aforesaid; that the above named

persons were duly elected, qualified and acting trustees of said corporation at the time of its dissolution and thereupon became the trustees of the creditors and stockholders of the corporation with full power and authority to sue and recover the debts and property of the corporation by the name of the trustees of said corporation with authority to collect and pay the outstanding debts, settle all of the affairs of the corporation and divide among the stockholders the money and other property that remained after the payment of the debts and necessary expenses; that in their capacity as such trustees under the provisions of Section 3707 of Remington's Code of the State of Washington said trustees became possessed of the money theretofore in the treasury of the corporation and the said trustees distributed the same by way of dividends and return of the capital stock to the shareholders, which distribution was made on or about June 3, 1919. That since said date all of the affairs of the corporation have been managed and controlled by said board of trustees hereinbefore named and not by this defendant except insofar as he was a member of said board of trustees.

VIII

That the said defendant at no time ever owned or controlled more than 1353 shares of the capital stock of said corporation; that all sums paid to this defendant were authorized previous to such payments by the board of trustes and by the stockholders and were subsequently ratified and approved by the stockholders, and that as to the 798 shares formerly owned by Charles A. Miller, the said Charles A. Miller voted affirmatively in favor of a resolution of the board of trustees authorizing the payment of the same as a fair and just compensation for the services to be rendered and that the said Frederick L. Denman acquired said 798 shares with full knowledge of the fact that the said Charles A. Miller had affirmatively approved the payment of said commissions to this defendant and that the said Frederick L. Denman, himself, and as the successor of the stockholders named in the amended complaint, likewise ratified and approved the action of the board of trustees in the payment of the 2½ per cent commissions hereinbefore referred to. The authorization referred to is shown by the minutes of the meeting of January 7, 1919,

heretofore referred to and the authorization was also approved by the board of trustees at meetings at which the trustees were present, held during the summer of 1918 and in the fall of 1918.

SECOND AFFIRMATIVE DEFENSE

For a further and second affiamative defense to the third and fourth causes of action set forth in the seventh amended complain, defendant alleges:

I

That the services performed by this defendant in winding up the affairs of the corporation and in selling and disposing of the assets and in the conversion of the same into money and the distribution of the same to the stockholders, were services rendered outside the cope of his official duties as president and trustee of the corporation; that the reasonable and fair value of the services rendered to the corporation by this defendant outside the scope of his official duties as president and trustee was the sum paid by the corporation for such services; that even though there was no express con-

tract between the corporation, its trustees and stockholders for the payment of said services, the defendant is entitled to the sums paid for the reason that they were reasonably fair and just for the services rendered outside the scope of the official duties of the defendant as provided by the by-laws of the corporation and that an implied contract was created for such services even though the court should hold that there was no express contract for the payment of the amount received by the defendant in the winding up of the corporation, the conversion of its property into money and the distribution of the same among the stockholders.

THIRD AFFIRMATIVE DEFENSE

For a further and third affirmative defense to the seventh amended complaint, defendant alleges:

I

That by reason of the actions of the said Frederick L. Denman and Charles A. Miller and by reason of the acts and things done and performed by them as set forth in the first affirmative defense,

to which reference is hereby made and the same is hereby made a part of this third affirmative defense, the said plaintiff is estopped from claiming a return of said commissions, or any part thereof from this defendant; that as to the $1436.40 claimed by the plaintiff in the second cause of action, the payments were made in January, 1912, 1913, 1914, 1915, 1916, 1917 and 1918; that this action was not commenced until more than three years after January, 1918; to-wit, on November 21, 1921, as to the second cause of action and that the liability of the defendant, if any, accrued more than three years before the commencement of the second cause of action and is barred by the statute of limitations.

FOURTH AFFIRMATIVE DEFENSE

For a further and fourth affirmative defense to the seventh amended complaint, this defendant alleges:

I

That as to the first cause of action, the payments were made in the months of January, 1912, down to and including January, 1918, and that all of the

amounts claimed by the plaintiff in the first cause of action accrued, if at all, more than three years prior to the date of the commencement of this action except as to the payments in January, 1917, and 1918, and that the same are barred by the statute of limitations.

FIFTH AFFIRMATIVE DEFENSE

For a further and fifth affirmative defense to the seventh amended complaint, this defendant alleges:

I

That at the time of the commencement of this action, the said Charles A. Miller was the owner of 798 shares of the capital stock of the Pacific Cold Storage Company; that no claim of the said Charles A. Miller accrued while he was the owner and holder of said 798 shares of stock; that no assignee of the claim of Charles A. Miller so accruing can be maintained in the courts of the United States under Equity Rule 94, or at all, either in law or in equity. (Trans. pp. 64-91.)

In all the causes of action, plaintiff alleges that the corporation was dissolved by an order of the court on the 2d of June, 1919, and that the defendant appropriated all of the sums claimed, wrongfully and without right while acting as president and trustee of the corporation. The corporation remained in existence until the 2d of June, 1919. The alleged misappropriations by the defendant occurred while the corporation was still in existence and undissolved. The corporation, therefore, had a legal claim against its officers and trustees for any money that had been misappropriated by the defendant from the corporation. A cause of action for such alleged wrongs on the part of the defendant rested solely in the corporation. The corporation alone had the right to sue for the recovery of the alleged misappropriations. No stockholder could maintain an action in his own name. The stockholder had no claim against the trustee who had misappropriated the funds for the corporation. He had no contractual relation with the defendant. His action was not direct against the defendant but was derivative through the corporation. There was no privity between the defendant and the plaintiff or Miller. If the defendant took any of the funds of the corporation to which he was not en-

titled, the plaintiff had no cause of action directly against him. He did have the right, if the directors of the corporation refused to bring suit, to commence an action on behalf of the corporation for the recovery of the funds for the benefit of the corporation, but not for his own direct benefit. If the corporation wrongfully paid out any money to any trustee or to anyone else not entitled to it, the corporation alone had the right to recover such sums unless the directors refused to do so when properly requested by the stockholder. It is apparent that the plaintiff is seeking to recover from the defendant the moneys and assets which belonged to the corporation at the time the alleged misappropriations occurred while the corporation was still in existence. If the defendant misappropriated any of the funds of the corporation wrongfully and without right it is plain that the corporation had the right, and it was its duty to sue the defendant for the recovery of the assets so wrongfully misappropriated. The right of action rested primarily in the corporation. If the corporation had sued for the recovery of the sums so misappropriated, there could be no doubt as to its right to recover the same. This right to recover funds misappropriated by an officer or trustee of the corporation cannot

rest both in the stockholders and in the corporation. It is the liability of the recreant trustee to the corporation. If the corporation is dominated by the recreant trustee so that the corporation is helpless and cannot bring the action itself, then a stockholder could set the machinery of the courts in motion to recover the funds so misappropriated, for the benefit, however, of the corporation.

But the stockholder cannot set the machinery in motion in any action in the federal court unless he alleges in his complaint that the money was misappropriated at a time when he, himself, was a stockholder. There is no such allegation in the complaint except as to the 60 shares held by the plaintiff originally. As to the Miller stock, the complaint clearly shows that Miller was the owner of the stock at the time all of the misappropriations occurred, except as to the last payment of $2,500 in January, 1920.

In all cases where the cause of action rests primarily in the corporation and the action is instituted by the stockholder for the benefit of the corporation for the reason that the directors of the corporation refused to bring the suit, being dominated by the recreant trustee, the corporation was an indispensable party, and the action is one in equity and not at law.

Throughout the progress of this case, the defendant contended that the action was one in equity and not a law. Whether the action was one at law or in equity must be determined by the pleadings themselves and from the allegations of the complaint. It is true that the lower court declined to treat the action as one in equity and construed the action to be one at law over the continuous objection of the defendant. It is still our contention that the action is one in equity and not at law and must be governed by the rules of the federal equity practice. It is true, the court submitted the case to a jury, but if the action was in fact in equity and not at law, we think the verdict of the jury in this case must be treated as solely advisory and not binding upon the court.

The demurrer to the complaint should have been sustained upon all of the grounds stated in the various demurrers. Measured by the rules regulating the federal equity practice, the complaint fails to state a cause of action and the judgment of the lower court was correct and must be upheld by this court. No allegation was made in the complaint showing any compliance, or attempted compliance with equity rule 94, which merely restates the law as it existed prior to the promulgation of such rule.

In derivative actions such as this, the corporation is always a necessary and indispensable party.

"* * * before the shareholder is permitted in his own name, to institute and conduct a litigation which usually belongs to the corporation, he should show, to the satisfaction of the court, that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated effort, with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court. If time permits, or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body, in the matter of which he complains. And he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it."

Hawes v. Oakland, 104 U. S. 450.

None of these necessary allegations are contained in the complaint.

THE CORPORATION AN INDISPENSABLE PARTY

Whenever a stockholder brings an action for the recovery of money misappropriated by a trustee or agent:

"The corporation itself is an indispensable party defendant to a stockholder's action for the purpose of remedying a wrong, which the corporation itself should have remedied. This rule is due to the fact that the corporation is entitled to be heard. A similar possible suit by the corporation is thereby prevented and the remedy made effective against the corporation as well as others. The corporation is a necessary party defendant, and must be actually brought into court by service or otherwise even though it is a foreign corporation and cannot be served and refuses to appear."

3d Cook on Corporations, Sec. 738.

The rule that the corporation is an indispensable party is discussed with wonderful clearness and ability by Pomeroy in his last edition of his work on Equity Jurisprudence.

"It is absolutely indispensable that the corporation itself should be joined as a party—usually as a co-defendant. The rationale of this rule should not be misapprehended. The stockholder does not bring such a suit because *his* rights have been *directly* violated, or because the cause of action is *his*, or because *he* is entitled to the relief sought; he is permitted to sue in this manner *simply in order to set in motion the judicial machinery of the court.* The stockholder, either individually or as the representative of the class, may commence the suit, and may prosecute it to judgment; but in every other respect the action is the ordinary one

brought by the corporation, it is maintained directly for the benefit of the corporation, and the final relief, when obtained belongs to the corporation, and not to the stockholder-plaintiff. The corporation is, therefore, an indispensably *necessary* party, not simply on the general principles of equity pleading in order that it may be bound by the decree, but in order that the relief, when granted, may be awarded to it, as a party to the record, by the decree. This view completely answers the objections which are sometimes raised in suits of this class, that the plaintiff has no interest in the subject-matter of the controversy nor in the relief. In fact, the plaintiff has no such *direct* interest; the defendant corporation alone has any direct interest; the plaintiff is permitted, notwithstanding his want of interest, to maintain the action solely to prevent an otherwise complete failure of justice."

3d Pomeroy, Sec. 1095.

In the case of *Greaves v. Gouge*, 69 New York, 156, the action was brought by a stockholder to recover funds misappropriated by the president of the corporation. In that case the court says:

"There is no doubt that a stockholder has a remedy for losses sustained by the fraudulent acts, and for the misapplication or waste of corporate funds and property by an officer of the corporation; but the weight of authority is in favor of the doctrine that an action for injuries caused by such misconduct must be brought in the name of the corpora-

tion, unless such corporation or its officers, upon being applied to for such a purpose by a stockholder, refuse to bring such action. In that contingency, and then only, can a stockholder bring an action for the benefit of himself and others similarly situated, and *in such an action the corporation must necessarily be made a party defendant.*"

"The right to maintain a suit against the officers of a corporation for fraudulent misappropriation of its property is a right of the corporation, and it is only when the corporation will not bring the suit that it can be brought by one or more stockholders in behalf of all. (Hawkes v. Oakland, 104 U. S. 450.) The suit when brought by stockholders, is still a suit to enforce a right of the corporation, and to recover a sum of money due to the corporation; and the corporation is a necessary party, in order that it may be bound by the judgment. (Davenport v. Dows, 18 Wall. 626.) If the corporation becomes insolvent, and a receiver of all its estate and effects is appointed by a court of competent jurisdiction, the right to enforce this, and all other rights of property of the corporation, vests in the receiver; and he is the proper party to bring suit, and if he does not himself sue, should properly be made a defendant to any suit by stockholders in the right of the corporation."

Porter v. Sabin, 149 U. S. 473.

"That a stockholder may bring a suit when a corporation refuses is settled in Dodge v. Woolsey, 18 Howard 340, but such suit can only be maintained on the ground that the rights of the corporation

are involved. These rights the individual shareholder is allowed to assert in behalf of himself and associates, because the directors of the corporation decline to take the proper steps to assert them. Manifestly the proceedings for this purpose should be so conducted that any decree which shall be made on the merits shall conclude the corporation. This can only be done by making the corporation a party defendant. The relief asked is on behalf of the corporation, not the individual shareholder; and if it be granted, the comlpainant derives only an incidental benefit from it. It would be wrong, in case the shareholder were unsuccessful, to allow the corporation to renew the litigation in another suit, involving precisely the same subject-matter. To avoid such a result a court of equity will not take cognizance of a bill brought to settle a question in which the corporation is the essential party in interest, unless it is made a party to the litigation."

18 Wallace 626.

The overwhelming weight of authority supports the proposition that in cases of this kind, the corporation is not only a necessary, but an indispensable party. The state and federal cases without exception sustain the proposition. For misappropriations of the assets of the corporation such as those alleged in the complaint, the stockholder can only sue as the representative of the corporation. In his individual capacity he has no right or power to sue

a recreant trustee for the misappropriation of the corporate funds or property. Therefore, if a suit can be maintained at all, it must be maintained in his representative capacity and the corporation must be a necessary and indispensable party. The authorities of the state and federal courts sustaining this contention of ours are so numerous that no useful purpose would be subserved by attempting to cite all of them. The following are a few of the cases in addition to those which we have cited:

Smith v. Hurd, 53 U. S. 383.
Ninneman v. Fox, 43 Wash. 43.

The opinion in the Ninneman case was written by Judge Rudkin, in which he says:

"The right of a third party to maintain an action for injuries resulting from a breach of a contract between two contracting parties, has been denied by the overwhelming weight of authority of the state and federal courts of this country and the courts of England. To hold that such actions could be maintained, would not only lead to endless complications, in following out cause and effect, but would restrict and embarrass the right to make contracts by burdening them with obligations and liabilities to others, which parties would not voluntarily assume."

He further says:

"If it be claimed that the acts of the respondents amounted to a tort against the corporation, the same rule applies."

Counsel for plaintiff, however, insists that the Pacific Cold Storage Company has been dissolved and that the dissolution of the company in some manner distinguishes the present case from the cases where the corporation is still in existence at the time the stockholder brings the representative suit for the benefit of the corporation. But under the statutes of the State of Washington relating to dissolved corporations, all of the assets, powers and privileges of the corporation are vested in the trustees of the company at the time of the dissolution They are clothed with the power to collect the assets of the corporation, to maintain suits for and on behalf of the corporation, to collect the assets, pay the debts and distribute the balance to the stockholders and in general to manage the affairs of the corporation in the same way as though the corporation were still in existence.

Section 3707, 1st Remington's Code is as follows:

"3707. *Power of Trustees upon Dissolution of Corporation.* Upon the dissolution of any corpora-

tion formed under the provisions of this chapter, the trustees at the time of the dissolution shall be trustees of the creditors and stockholders of the corporation dissolved, and shall have full power and authority to sue for and recover the debts and property of the corporation by the name of the trustees of such corporation, collect and pay the outstanding debts, settle all its affairs, and divide among the stockholders the money and other property that shall remain after the payment of the debts and necessary expenses."

The statute vests in the trustees at the time of the dissolution the same powers and duties that the corporation had. As we have already seen, the courts uniformly hold that where a receiver of the corporation has been appointed, the receiver is a necessary and indispensable party. The reason of this rule is that all of the powers of the corporation are vested in the receiver. By operation of law, upon the dissolution, such powers and duties are vested in the trustees at the time of the dissolution and it is also uniformly held that the receiver is a necessary party, even though he be discharged. In the case of *Michel v. Betz*, 95 N. Y. Sup. 844, this question arose. A receiver had been appointed for the corporation and had been discharged. The court held that he was a necessary party and further said in the opinion:

"If it should be held that this receiver was divested of this cause of action by reason of his discharge as receiver, it would follow, I think, that the cause of action would then vest in the directors of the corporation, as trustees for the creditors and stockholders, under the provision of section 30, of the General Corporation Law, chapter 687, p. 1811, Laws 1892. The corporation being dissolved, it would own no property. The property would then vest in the directors of the corporation, who would become trustees for the creditors and stockholders, and would be entitled to enforce this cause of action and would be necessary parties thereto. I think, therefore, that the action cannot be maintained, without the presence of either the receiver or directors of the corporation as either parties plaintiff or defendant, and that for that reason the demurrer should have been sustained."

The New York statute vesting in the trustees powers formerly exercised by the corporation, is very similar to the statute of this state. The New York statute was construed in the case of *Marstaller v. Mills*, 38 N. E. 370, in which it was held that the directors at the time of the dissolution took the place of the corporation and succeeded to all its rights and privileges as well as its powers and duties. In the case of *Taylor v. Holmes*, 127 U. S. 489, the action was brought by the stockholders instead of the corporation to correct a deed given by

the corporation. In the *Taylor v. Holmes* case it was held:

"In a bill filed by two stockholders to correct a deed to the corporation, an averment that complainants are owners of a majority of all of the stock, but without any statement as to how or where they became such, or whether they were such at the time the matter complained of occurred, or became stockholders afterwards, is not a sufficient averment of their relation to the corporation, or of their interest in the subject of the suit, to enable them to bring the suit in their own names, where it appears that, although the corporation has expired by limitation, it still exists for the purpose of winding up, and that, although most of the directors are dead, one of them survives, and that no application has been made to him to bring the suit, nor any effort to call together the stockholders or to obtain any united action in the assertion of this claim."

The court further said in *Taylor v. Holmes*:

"It is, however, alleged that the corporation itself is extinct by reason of the limitation placed upon its existence, under the articles of incorporation, by which it expired on the 30th day of August, 1878. But, under the laws of New York, the existence of such a corporation was continued after the period for which it was limited for the purpose of winding up its business, and for the purpose of collecting and distributing its assets and paying its debts. Although the allegation of the bill is that many of the directors of the company are dead, still it is

shown that one of them survives, and no assertion is made that there was any application to this surviving director on the part of the defendants for the purpose of instituting any proceedings looking to the rectification of this deed, or for the recovery of the real estate in North Carolina; nor does it appear that there was any request made to him to bring any suit either at law or in chancery for that purpose. No effort was made to call together the stockholders to take any action on the part of the company, or to elect other directors, or to obtain any united action in the assertion of the claims now set up. Although there is in the bill a declaration that the two complainants are owners of a majority of the stock of the Gold Hill Mining Company, there is no statement as to when or how they became such, or whether they were such stockholders during the times that injuries were inflicted, of which they now complain, in regard to the taking possession of the property by the defendants, or whether they became stockholders afterwards. In short, there is no such averment of their relation to the corporation, or of their interest in the matter about which they now seek relief, as brings this action within the principle of the decisions of this court upon the subject."

8 Supreme Ct. Rep. page 1193.
Hawes v. Oakland, 104 U. S. 450.

In the case of *Taylor v. Holmes*, the charter of the corporation had expired. Its affairs were in the hands of the trustees or directors under the laws

of New York, which are similar to the laws of this state. The action was dismissed for the reason that the corporation, or its successors or officers were necessary parties even though it had been dissolved by expiration of its charter.

The trustees of the Pacific Cold Storage Company at the time of its dissolution were made statutory trustees for the winding up of the corporation. They had the power to bring a suit against the defendant for the recovery of these very sums. The statute provides that the suit shall be brought in the name of the trustees and that any sums collected that had been misappropriated by the defendant belong to the trustees for distribution among the stockholders. No one can doubt that the trustees under the statute, had the right to sue Richardson for this money about which the plaintiff complains. The right existed in the corporation before the dissolution. By the decree of dissolution this right was assigned, by operation of law, to the trustees. They took the place of the corporation and acquired a cause of action that was formerly primarily vested in the corporation. The right to sue cannot be vested in both the trustees and the stockholders. The dissolution of the corporation vested this right in the trustees. They alone can maintain the action. The

rule is unquestionable that the corporation is an indispensable party. The same reason underlying the rule with regard to the necessity of making the corporation an indispensable party applies with equal force to the statutory trustees upon dissolution. The action primarily rests in the trustees so far as the stockholders are concerned. The stockholder cannot maintain an action in his own name unless he shows that a demand has been made upon the trustees to bring the action and that they have refused to do so. If Richardson misappropriated the money there was an implied promise upon his part to return it. A contractual relation existed between Richardson and the corporation. Its effect was the same as though a contract had been made between Richardson and the corporation to return the money he had misappropriated.

The plaintiff claims the right as a stockholder to maintain an action for injuries resulting to it for a breach of a contract between two contracting parties, that is, between Richardson and the corporation. Such right has been denied by the overwhelming weight of authority of the state and federal courts of this country and the courts of England.

"To hold that such actions could be maintained, would not only lead to endless complications, in fol-

lowing out cause and effect, but would restrict and embarrass the right to make contracts by burdening them with obligations and liabilities to others, which parties would not voluntarily assume."

Ninneman v. Fox, 43 Wash. 43.

In the same case it was further said:

"If it be claimed that the acts of the respondents amounted to a tort against the corporation, the same rule applies."

The plaintiff is seeking by what he denominates an action at law to sue directly, Richardson for moneys Richardson owed the corporation during its existence, and after dissolution, which he owed to the trustees. This cannot be done in an action at law. The plaintiff is seeking to enforce rights vested in the statutory trustees on dissolution.

"But even if the circumstances were such as to justify individual stockholders in seeking the aid of the court to enforce rights of the corporation, it is clear that their remedy is not at law. The particular equitable relief sought in Fleitmann v. Welsbach, 240 U. S. 27, was denied; but this denial affords no reason for assuming that the long-settled rule under which stockholders may seek such relief only in a court of equity will be departed from because the cause of action involved arises under the Sherman law."

United Copper Securities Co. v. Amalgamated Copper Co., 244 U. S. 261.

In the note to the above case the court says:

"Quincy v. Steel, 120 U. S. 241, was an equity suit by a stockholder to enforce a purely legal claim of the corporation—damages for breach of contract; and the court sustained a demurrer to the bill, not because the suit should have been at law, but because the bill failed to show that complainant had made sufficient effort to induce the directors to enter suit."

In the case of *Von Arnim v. American Tube-works*, 74 N. E. 681, the court says:

"The plaintiff's cause of action is founded upon the right of the corporation itself to recover for the misappropriation of its property by the deceased. If any of the defendants are finally held liable to make restitution, generally reimbursement would be made not to the plaintiffs, but to the corporation which always is a necessary party to such suits, though where the exigencies of the case require it, and to avoid circuity of action a stockholder may be granted individual relief in the same suit."

So in this case if the liquidating trustees were made parties to the suit, a court of equity might grant relief to the plaintiff, if he is entitled to it. Before the court can grant relief, he is compelled to have the liquidating trustees made parties to the suit so that the court has full jurisdiction to settle the entire controversy.

Whatever sum is recovered from the defendant must be distributed by the trustees pro rata among the stockholders. All of the stockholders have as much right to any recovery for money owed by Richardson to the corporation as the plaintiff. In Cook on Corporations, section 734, page 2426, it is said:

"It is a well-established rule of law that a stockholder's suit to remedy a wrong done to the corporation must be in behalf of all the stockholders, since they are all equally interested in the results of the suit. Accordingly, the complainant or complainants must bring the suit in behalf of themselves and such others of the stockholders as care to come in. * * *

"There has been considerable controversy as to whether a suit to hold directors liable for fraud, negligence, or ultra vires acts should be at law or in equity. The well-established rule is that such a suit, when brought by a stockholder, should be in equity, inasmuch as it is in the nature of an accounting or the prevention of illegal acts. A suit at law is not the proper remedy."

In the case of *Backus v. Brooks*, 195 Fed. 452, the court said:

"A court of equity is the tribune and the only tribune, to provide an effective remedy."

In the case of *Jones v. Missouri-Edison Co.*, 144 Fed. 765, the court said:

"Any sale of the corporate property to themselves, any disposition by them of the corporation or of its property to deprive the minority holders of their just share of it or to get gain for themselves at the expense of the holders of the minority of the stock, becomes a breach of duty and of trust which invokes plenary relief from a court of chancery.

"If the corporation has been dissolved, or is in the process of winding up, then the suit which would otherwise have been brought in its name, may be maintained by the receiver official liquidator or other official representative who has succeeded to its property and franchises for the purpose of final settlement."

3d Pomeroy, Sec. 1094, 4th Ed.

In *Re Swoford Bros. Dry Goods Co.*, 180 Fed. 549, the court held that the right to bring a suit against the president for misappropriation of the assets of the corporation was vested in the trustee. In *Reed v. Hollingsworth*, 135 N. W. 37, it was held that a demand must be made upon a receiver before stockholders can sue. To the same effect is *Sigwald v. City Bank*, 64 S. E. 398. In *Saunders v. Bank of Mecklenburg*, 75 S. E. 94, it was held that demand must be made on receiver before stockholders can sue.

"The stockholder, either individually, or as the representative of the class, may commence the suit,

and may prosecute it to judgment; but in every other respect the action is the ordinary one brought by the corporation, it is maintained directly for the benefit of the corporation, and the final relief, when obtained, belongs to the corporation, and not to the stockholder-plaintiff. The corporation is therefore, an indispensably necessary party, not simply on the general principles of equity pleading in order that it may be bound by the decree, but in order that the relief, when granted, may be awarded to it, as a party to the record, by the decree."

3d Pomeroy, section 1095.

One of the reasons that the corporation is an indispensable party is that the right of action is primarily vested in the corporation. If the right of action is primarily vested in the trustees, as the statutes of this state provide upon dissolution, then the same reasons exist for requiring the trustees to be indispensable parties. It is the duty of the trustees to collect this money from the defendant, if he has wrongfully taken it, and to distribute it among the stockholders, but the legal title to the right of action is vested in the trustees in the same way as it had been theretofore vested in the corporation. It is inconceivable that a party may maintain an action at law for a failure on the part of one party to pay another party what it owes. No sane reason can be suggested for the assertion that a corpora-

tion is a necessary party in an action of this kind and that the assignee of all of the rights of the corporation is not a necessary party. In Pomeroy's last edition of his great work on equity jurisprudence, he cites numerous cases in support of the position that we are contending for. No statement is made in the complaint that the trustees are not reputable men and men of character. If any claim exists against Richardson, it is their duty to enforce it. If they refused to do so then the plaintiff would have the right to bring the action for the benefit of the trustees and to make them parties to his litigation.

If the pliaintiff did amend his complaint and bring in the trustees and such action would not deprive this court of jurisdiction, then it is possible that the court with all parties interested before it, might make a complete adjustment of the entire conversy, even to the extent of distributing to the plaintiff his aliquot part of the recovery less the costs and expenses thereof.

It must be admitted that the liquidating trustees have the right to maintain this action against Richardson. Suppose they do institute an action against him and recover. The allegations of the complaint are that the corporation has no property other than

this. The trustees would incur considerable expense in the maintenance of such action. From the total amount recovered the expenses would necessarily be deducted before a distribution could be made to the stockholders. Therefore, it is plain that the claim is not a liquidated claim for a specific sum of money on the part of any stockholder.

If the plaintiff should prevail in this action upon the theory that the right of action is vested primarily in him, then a judgment rendered here would not be a bar to an action by the trustees or by other stockholders. If, on the other hand, the plaintiff is suing in his representative capacity, then this action would bar other stockholders because in his representative capacity the action can only be brought for the benefit of the plaintiff and all other stockholders similarly situated.

> *Williams v. Erie Mountain Mining Co.*, 47 Wash. 360.
>
> *Farmers Loan & Trust Co. v. N. Y. N. Ry. Co.*, 150 N. Y. 410.

The reasons given by Judge Rudkin in the case of *Ninneman v. Fox*, 43 Wash. 43, clearly establish the fact that an action at law can not be brought in an action of this kind. There is no privity of contract

between the plaintiff and defendant, or between the defendant and stockholders. As he has no right of action at law he has none unless it is in equity and then he must conform to the rules of law regulating the equity practice.

The statute says that upon the dissolution of any corporation the trustees at the time of the dissolution shall be trustees of the crditors and stockholders of the corporation dissolved and shall have full power and authority to sue for and recover the funds and property of the corporation by the name of the trustees of such corporation. (Remington's Code, Sec. 3707.)

The statute vests in these trustees the sole power to collect funds misappropriated by a trustee during the lifetime of the corporation. The power is not vested in anyone else. If a corporation is a necessary party, it is for the reason that the corporation alone has the right of action vested in it. If the right of action is vested in the trustees and in them alone, how can they be deprived of their property as trustees for the benefit of all of the stockholders by a direct action by one stockholder against one of the trustees for the recovery of funds paid to him during the corporate existence of the corporation?

The defendant is only one of the trustees for winding-up purposes. The statute says that all actions must be brought in the name of the trustees, not in one of them. It is inconceivable that an action can be vested in the trustees and in the plaintiff at the same time for the same cause of action. There is no authority anywhere for this contention. If the defendant owes any money that he has misappropriated, he owes it to the trustees that the statute says are entitled to have it. He does not owe it to this plainiff. All the money that he misappropriated must be for the benefit of all of the stockholders, not for this plaintiff.

THE COMPLAINT DOES NOT STATE A CAUSE OF ACTION

Inasmuch as this action is one in equity and the complaint does not contain the allegations which are indispensable under Rule 94 in the federal courts, no cause of action is stated in the complaint and the plaintiff in no event would be entitled to any recovery regardless of any errors that the court may have made in submitting the case to the jury.

STATUTE OF LIMITATIONS

It will be observed that this action was originally commenced on the 29th of July, 1919, not in the name of this plaintiff but in the name of other plaintiffs. The seventh amended complaint was filed on the 30th of November, 1921. The suit by the plaintiff as assignee of the 798 shares of the Miller stock was commenced on the last named date. It will be observed that the plaintiff claims the right to recover 2½ per cent on dividends paid in January, 1912, to January, 1918, inclusive. Any misappropriation of the funds of the corporation therefore as to the first and second causes of action accrued not later than January, 1918, and running back to 1912. If the plaintiff were entitled to recover at all, his cause of action existed when the misappropriations were made in the several years from 1912 to January, 1918 inclusive. As to the first cause of action, based upon his ownership of sixty shares of stock, the action was commenced in July, 1919. More than three years had elapsed as to all moneys converted by the defendant prior to January, 1917.

As to the second cause of action, where the plaintiff claims by virtue of the Miller stock, it is ap-

parent that this action by the plaintiff to recover upon the Miller stock was not commenced until the date of the filing of the seventh amended complaint on the 29th of November, 1921. The plaintiff did not attempt to bring the suit originally as the assignee of Miller, but brought the suit as the agent of Miller, which the court held he could not do. Therefore, when the plaintiff amended his complaint in the seventh amended edition, it was in effect the commencement of a new action and the statute of limitations would bar all claims on account of the 2½ per cent of the dividends for the reason that more than three years had elapsed since January, 1918, when the last misappropriations were made according to the allegations of the complaint.

If the plaintiff had any right of action at all, that plainly accrued at the dates the misappropriations were made and we think all of these claims are clearly barred by the statute of limitations as to the second cause of action, and as to the first cause of action except as to the payment in January, 1917, and January, 1918.

It will be noticed that all of the sums alleged to have been misappropriated by the defendant were appropriated by him prior to the dissolution of the corporation on June 2, 1919, except one payment of

$2500 in the month of January, 1920. With the exception of the $2500 paid in January and referred to in the third and fourth causes of action, all misappropriations were made by the defendant, according to the allegations of the complaint, while the corporation was undissolved and a legal entity. There is only one way to dissolve a corporation in this state and that is by an order of the court upon a proper petition. The Supreme Court of Washington has held that the capital stock of a corporation can not be decreased except in the manner prescribed by law and by analogy it must follow that the corporation can not be dissolved except in the manner provided by the statutes of the State of Washington.

Therefore it is manifest that with the exception of the $2500 payment of January, 1920, all misappropriations were from the Pacific Cold Storage Company. The corporation remained in existence until June, 1919. So much appears from the face of the seventh amended complaint and we think it was the duty of the court to have sustained the demurrer on the ground that the action was not commenced within the time allowed by law and was barred by the statute of limitations.

However, the defendant pleaded in its answer the statute of limitations and the evidence abundantly sustained the contention that the claim as to the 2½ per cent commission is barred by the statute. The plaintiff testified on cross-examination that he had charge of the books of account of the Pacific Cold Storage Company for nearly eighteen years and that everything was done under his direction so far as the accounting was concerned; that he was secretary and treasurer for a good many years and that in the early years was auditor, but only in the year 1912, and that in 1912 when this 2½ per cent dividend was paid, he was auditor and treasurer. He knew of the entry on the books of the company showing that the defendant was getting a salary of $1,000 per month and a sum equal to 2½ per cent upon the dividends paid to the stockholders and he said: "In 1912 when it was first given, I knew of it." (Trans. 109.) He signed the last check, the one of January, 1918, for such 2½ per cent commission and knew that these dividends were being paid from the year 1912 to 1918 inclusive. He said that he did not at any time ever protest to any of the sotckholders, or to the company, or at any stockholders' meeting against the payment of this 2½ per cent commission—that he did not

dare to because Mr. Richardson was the dominating party, he dominated the company. He said: "I knew my job would be good-bye and between my job and my interest in the company I wanted to stay by and watch them." (Trans. p. 110.) He said that he was an officer of the company for eighteen years and protested to no one as to the dividend and that Mr. Richardson misappropriated the 2½ per cent commission and yet since 1912 he raised no objection thereto and did not write to any of the stockholders about it and that he did not dare to do so. (Trans. p. 110.)

Mr. Denman further testified that a yearly report was prepared by the accounts showing the payment of this 2½ per cent commission as additional salary and that the same was itemized each year in a written report, so that the plaintiff is in the position of now seeking to recover his pro rata share of the 2½ per cent commission which was paid out with his knowledge every year from 1912 down to 1918. The evidence further shows that the reports of the certified public accountants with the supplement prepared by the plaintiff were mailed to the advisory committee in Scotland and distributed among the stockholders there who owned 85 per cent of the stock. The evidence further shows

that at each annual meeting of the stockholders these reports of the certified accountants were submitted to the stockholders' meeting and usually paproved by them and were always submitted to the board of trustees of the corporation at the meeting held immediately after the adjournment of the stockholders' meeting and were unanimously approved by them. (Testimony of Charles Richardson, Trans. p. 138, *et seq.*; testimony of Rufus Davis, Trans. p. 178; testimony of A. W. Sterrett, Trans. p. 171.)

So far as the 2½ per cent commission was concerned, the knowledge of its payment was brought home to the stockholders and to the board of trustees and particularly to the plaintiff. He knew of the payment of this money by the corporation to Richardson as additional salary for many years prior to the commencement of this action and for more than three years prior to the institution of this suit. The corporation and all of its stockholders had knowledge of its payment and had accurate knowlede as to the exact date of the alleged misappropriations, all of which was more than three years prior to the commencement of the suit.

We have no fault to find with the reasoning of the cases cited by the plaintiff under his sub-title

of "statute of limitations," but it has no possible application to the facts in this case.

The 2½ per cent commission under the evidence was authorized by the advisory committee, to which we will later refer. It was thereafter authorized by the unanimous vote of the board of trustees of the corporation and with the knowledge and approval of the plaintiff himself and was ratified annually at each annual meeting of the stockholders, which the plaintiff is shown to have attended throughout the history of the company. The plaintiff is in no position to question the running of the statute of limitations against a claim for money paid to the defendant as a part of his salary, with his knowledge, consent and approval.

On page 31 of plaintiff's brief, he quotes from 1st Pomeroy Remedies, section 28, where it is said that the statute of limitations will not run against the *cestui que trust* unless there has been an open denial or repudiation of the trust brought home to the knowledge of the *cestui que trust* which requires him to act as upon an asserted adverse title. Here the knowledge of the payment of this money by the company to Richardson as additional compensation for his services was brought home to the plaintiff and to the other stockholders and certainly would re-

quire him to act as upon an asserted adverse title within the meaning of Pomeroy. All of the cases cited under this sub-division by the plaintiff refer to facts entirely different from those involved in this transaction. If the beneficiary did not know of the misappropriation, he might forcibly contend that the statute of limitations would furnish no bar to his recovery, but where he knew all of the facts and acquiesced in them, he certainly is in no position to raise the question.

In passing upon the defendant's motion for a nonsuit at the conclusion of the plaintiff's testimony, the court said:

"In this case with relation to the payment of the 2½ per cent commission for the years 1912 to 1916, the plaintiff in this case knew all about it. He was secretary for a time and auditor for much of the time, and bookkeeper all the time, and I guess a member of the board of trustees all the time. He knew about this. The defendant in this case, Mr. Richardson, was a member of the board of trustees as was Mr. Denman, the plaintiff in this case. The cases which are cited here by the plaintiff, so far as endeavoring to establish a fiduciary relation between the defendant in this case and the plaintiff, have no application, and the corporation was fully advised as to this payment. The payment was inaugurated by a majority of the board of trustees, by the majority of the stockholders representing their

local committee, and this was known, as the plaintiff testified on oath, to all the members of the board. A report was made every year including the entire expenses of the office, $34,000 some years and $32,000 some other years, and similar sums other years, and then a supplemental report was presented in which detail was made with relation to all of these expenses, and attached to the report. It is stated that this supplemental report was not submitted to the local board, but that it was sent to the foreign stockholders. But this payment was sufficiently brought to the attention of the corporation that it was the duty of the corporation to bring an action to recover or to cease to approve these reports, as was shown was done. The payment of this amount, if wrongful, if unauthorized, meant of course that action must be commenced by some authorized party within the period of limitation, and the statute of limitation is three years. The plaintiff in this case has no greater right than would the corporation have. The corporation would have to bring this action within three years. The plaintiff in order to bring any action to which he may be entitled or to enforce any remedy which he may have, must bring the action within three years. So that all of the years prior to 1917 are eliminated or barred by reason of the statute of limitation, so far as the 2½ per cent commission is concerned." (Trans. pp. 125, 126.)

The court further said:

"The plaintiff in this case is estopped from claiming anything under the Miller shares of stock so far

as the 5 per cent commission is concerned; and if Miller became a party to this action prior to the period of limitation with reference to any of the 2½ per cent years of course those may be pleaded by the plaintiff. I do not think that the plaintiff's right of action is barred as to the years 1917 and 1918, and if Mr. Miller comes into this case within three years after any of those years then his action may stand likewise." (Trans. pp. 126, 127.)

The court was clearly right in granting a non-suit as to all claims for commissions prior to and including the year 1916. The remaining portion of the 2½ per cent commission claim was submitted to the jury and a verdict was rendered in favor of the defendant, so that we are only concerned with the action of the court in granting the non-suit as to the 2½ per cent commissions for the years 1912 to 1916, inclusive. Whether the court construes this action as one in euqity or at law, the plaintiff is certainly estopped from asserting that the statute of limitations did not run against this portion of his claim.

CHARLES A. MILLER STOCK

Consisting of 798 Shares

The first complaint filed in the Superior Court of Pierce County, Washington, on the 29th of July, 1919, stated that Charles A. Miller was the owner of 798 shares of the capital stock of the Pacific Cold Storage Company on that date. The seventh amended complaint shows that Miller was the owner of this stock for many years prior to the commencement of this action. On the 31st of May, 1918, Miller was a member of the board of trustees. At a meeting of the board of trustees on January 7, 1919, Miller was present and voted in favor of a resolution fixing Richardson's compensation at 5 per cent for his services in liquidating the business of the Pacific Cold Storage Company. In fact, Miller seconded adoption of the resolution adopted at a meeting of the board of trustees fixing the defendant's compensation at 5 per cent upon the amount returned to the stockholders. (Minute Book of Pacific Cold Storage Company, Plaintiff's Exhibit No. 1, p. 305.) It was alleged in the sixth paragraph of defendant's amended answer to the

seventh amended complaint that the said resolution "was offered at said meeting by Harold Seddon, who moved its adoption, which was seconded by Charles A. Miller, the owner at that time of 798 shares of the capital stock of the company, being the same Charles A. Miller named in paragraph II of the second and fourth causes of action." (Trans. p. 85.)

The reply of the plaintiff admits that the said Charles A. Miller voted in favor of said resolution. The seventh amended complaint refers to Exhibit "A," attached to the complaint, which purports to be an assignment by Charles A. Miller to the plaintiff dated the 10th of September, 1919 (plaintiff's Exhibit No. 18). The plaintiff never acquired any interest in the Miller shares of stock until September 10, 1919. Miller was the owner of said shares on January 7, 1919, the date of the adoption of the resolution fixing the defendant's compensation for the winding up and liquidation of the affairs of the Pacific Cold Storage Company.

Such was the condition of the record when the plaintiff rested his case, and such was the condition of the record at the time defendant made his motion for non-suit as to the plaintiff's cause of action asserting his right to a pro rata share of the 5 per

cent commission paid by the company to the defendant by way of compensation for his services in the liquidation of the company. The answer of the defendant pleaded that the plaintiff was estopped to claim anything on account of the Miller shares for such 5 per cent commission paid to the defendant for his liquidating services. In granting the motion for non-suit as to the Miller claim, the court said:

"As to Miller and with relation to the resolution, the adoption of which he moved: He is estopped,—the resolution estops him from now questioning it in this proceeding. If he had an equitable right to have that set aside that should have been done, but he could not do it in this proceeding. The equity and legal remedies may not be blended in the federal court. That is primary doctrine. The plaintiff in this case is estopped from claiming anything under the Miller shares of stock so far as the 5 per cent commission is concerned." (Trans. p. 126.)

And in advising the jury as to the granting of the non-suit, said:

"For, your information, I will state that last night after you and before we adjourned, I sustained the motion in this case made on the part of the defendant to eliminate from this case all of the claims for 2½ per cent commission that were paid prior to January, 1917, and also to eliminate from the case the 5 per cent commission claimed on ac-

count of the stock held by Miller. He having moved the adoption of the resolution which authorized the payment of the 5 per cent, and the plaintiff in this case, Mr. Denman, knew of that when he acquired that stock and Mr. Miller would be estopped to now come in in this legal proceeding and that he should recover the 5 per cent which he helped authorize to pay." (Trans. p. 130.)

And in further commenting to the jury, the court said:

"I think I might say for the benefit of the record that this case was commenced as a law action, insisted upon by the plaintiff as a law action throughout the entire litigation; that the objections urged by the defendant are matters which pertain to equitable actions. In the Federal court a party may not commingle legal and equitable remedies. If the plaintiff has any relief, equitable relief, that might be urged, it must be done in an equitable proceeding, and this is not such a proceeding and has been constantly insisted upon by the plaintiff as a law action and this case has proceeded as a law action, and equitable rights, if there are any, may not be urged in a law action." (Trans. p. 133.)

The action of the court in granting the non-suit as to the right of the plaintiff as the assignee of Miller, to recover on any part of the 5 per cent commission was clearly correct. Miller could not in good conscience be permitted to recover back from

Richardson the compensation which he had, by moving the adoption of the resolution, caused the corporation to pay to the defendant for his services by way of compensation. The resolution expressly sets forth all of the facts connected with the fixing of the compensation and recites that the compensation was reasonable and just and was proper for the corporation to pay. Miller voted for this resolution. The plaintiff purchased his stock with full knowledge that Miller had voted to pay a 5 per cent compensation to Richardson for his services in liquidating the company. The plaintiff testified (Trans. p. 117), that Miller had advised him before he bought the stock as to the fact that he had voted in favor of the adoption of the resolution fixing Mr. Richardson's compensation at 5 per cent.

Moreover, if the court construes this action to be an equitable one, then under Equity Rule 94 and under the decisions above quoted, the plaintiff could not maintain any action of this kind unless the plaintiff was the owner of the stock at the time of the commission of the wrong complained of. We think it is an action in equity and not at law and if we are correct in this assumption, then the plaintiff could not recover in this cause of action for the reason that it is shown affirmatively by his own

testimony that he was not the owner of the stock at the time the misappropriations took place, if there were any misappropriations. But in any event, it must be apparent that Miller could not recover and the plaintiff who acquired the Miller stock with full knowledge of the facts is in no better position than Miller would have been. Moreover, the record shows that Miller was present at the stockholders' meeting on the 31st of May, 1918, and was elected a member of the board of trustees for the ensuing year and was present at the trustees' meeting held immediately after the adjournment of the stockholders' meeting. The evidence establishes the fact that at this meeting of the trustees held on the 31st of May, 1918, the board of trustees fixed Richardson's compensation for winding up the affairs of the corporation at 5 per cent upon the amount returned to the stockholders, and later in the summer of 1918, after the receipt of the telegram from the advisory committee in Scotland, the board of trustees again approved the payment of the 5 per cent commission and again reiterated its action of May 31, 1918; and later, on January 7, 1919, again set forth all of the facts and again approved the action of the board of trustees in fixing the defendant's compensation at 5 per cent, and Miller

voted in favor of this resolution which recited that the amount was just and reasonable for the services to be rendered. It is difficult to see what other action the court could have taken as to the right of the Miller stock to participate in any recovery on account of the 5 per cent commission. There was no error in the action of the court in granting the defendant's motion for non-suit as to this item.

ADVISORY BOARD

On page 37 of plaintiff's brief, it is contended that the advisory board had no legal existence. Counsel quotes the statutes of the State of Washington relative to the organization of corporations and cites the case of *Murray v. MacDougall & Southwick Co.*, 88 Wash. 358, as authority for the contention that the affairs of a corporation are to be managed by the board of trustees. We do not contend that the control of the affairs of a corporation is not usually vested in the board of trustees—in fact, we think it is. However, the board of trustees and stockholders have the right to approve the organization of an advisory board among the stockholders. The evidence shows that 85 to 90 per cent

of the stock of the Pacific Cold Storage Company was held in Great Britain. Mr. Richardson stated that about the year 1901 or 1902, he visited Great Britain and advised the stockholders residing there that he was unwilling to assume the sole responsibility for the company and suggested at a stockholders' meeting there that they should appoint a committee to work in harmony with the board of trustees in the State of Washington; that the advisory board was created; that it organized and appointed first J. A. Mitchell as its secretary and subsequently appointed David Inglis as secretary. (Trans. p. 136.) The defendant further testified:

"I suppose I have written thousands of letters. I made an annual report every year to the advisory board in detail and sent them the accountant's reports made by Mr. Denman and Mr. Moorhouse, which were on file in Glasgow and remittances were made to them and they circularized the other stockholders and most generally sent them the checks. In other words we obeyed their instructions throughout the entire history of the company." (Trans. p. 137.)

He further stated that every year a report was made and filed in Glasgow, Scotland, and the stockholders were circularized as to what had been done regarding the dividends and were always consulted to determine what dividends should be paid; that

such reports were addressed to the board of trustees and to him as president; that as soon as the report of the accountant, Mr. Moorhouse came in and he had received from Mr. Denman his detailed statement, which consisted of a statement of the salaries, amount of salary paid to various employees of the company and the operation of the steamers and in fact all the little details that were not stated in the report by the certified public accountant, and in addendum that was attached to the accountant's report and as soon as he received these two, he sat down and wrote from 10 to 15 or 20 pages to the advisory board stating what had been done during the year, if there had been a loss at this point or the other, and all of the details of the affairs of the company; that these reports were filed every year and were sent over to the advisory committee with the statement of Mr. Denman and Mr. Moorhouse for the information of the stockholders. (Trans. p. 138.) He further stated that these reports of Mr. Denman and Mr. Moorhouse showing the payment of the 2½ per cent commission were brought before the stockholders' meeting and later before the board of trustees; that after such reports of the accountants had been sent to the advisory board and a reply received, he would call a meeting of the

board and the reports of the accountants and the suggestions of the advisory board were brought before the regular trustees' meeting and were always approved by the board of trustees and generally approved at the stockholders' meeting. (Trans. p. 139.) That the reports containing reference to the 2½ per cent commission were always brought to the attention of the board of trustees and approved without a dissenting voice. (Trans. p. 139.)

Defendant offered in evidence Exhibits 2-A to 14-A, inclusive, and Exhibit 23-A, all being reports of the accountant, with the supplemental report prepared by Mr. Denman attached to each one showing the payment to Richardson of 2½ per cent commission in addition to his salary of $1,000 per month. These reports were all unanimously approved at the annual meeting of the stockholders for the year 1912 down to and including the year 1918. The plaintiff was a member of the board of trustees for a portion of the time and voted, approving these annual reports as to the 2½ per cent commission. The action of the advisory board approving this payment of 2½ per cent commission was merely advisory and it was approved and adopted by the board of trustees, the governing body of the corporation. The action in fixing this additional compensation

was authorized by the advisory board and it was approved and put into effect by the board of trustees and such action was approved by the stockholders at their annual meetings as shown by the testimony of Charles Richardson, Rufus Davis, A. W. Sterrett and B. A. Moore.

The jury certainly had sufficient evidence to justify the verdict that the action fixing the additional compensation of 2½ per cent was the act of the board of trustees of the corporation.

It is immaterial as to what the powers of the advisory board were as none of the recommendations of the advisory board were put into effect until approved by the board of trustees. This is clearly demonstrated by the approval of the annual reports prepared by the plaintiff, himself. We assume that this court will not be concerned as to the legal powers of the advisory board because the fixing of the 2½ per cent additional compensation to the defendant does not rest upon the action of the advisory board but upon the action of the board of trustees and of the stockholders. It is therefore apparent that counsel's criticism of the advisory board has no relevancy to the issues involved in this case.

CONSENT OF OTHER AMERICAN STOCKHOLDERS IMMATERIAL

Under this division, plaintiff, in his brief, page 41, contends that the approval of the 5 per cent commission by the American stockholders was immaterial—that the board of trustees alone could authorize the payment of this commission. The communication from the advisory board contained in the resolution of January 7, 1919, discloses that the payment of the 5 per cent commission was approved by all of the British stockholders. The evidence of Mr. Richardson is to the effect that all of the American stockholders with the exception of the plaintiff and Charles A. Miller in writing approved the fixing of the compensation of 5 per cent for the liquidation of the affairs of the company. Ninety-nine and sixty-four one hundredths per cent of the stockholders approved the agreement for the payment of the 5 per cent commission. (Trans. p. 146.) If all of the stockholders had approved the action in fixing this 5 per cent compensation for liquidation, according to the reasoning of counsel, such action would be immaterial as the board of trustees is the governing body of the corporation. Such

testimony is material as bearing upon the reasonableness of the compensation. We do not rely upon the fact that the 5 per cent commission was authorized by more than 99 per cent of the stockholders, however, for the reason that the payment of this commission was affirmatively authorized, before the services were performed, by the board of trustees of the corporation at its meeting on May 31, 1918, and at a later meeting in August, 1918, and at a later meeting on January 7, 1919, as hereinbefore stated.

On page 41 of plaintiff's brief, it is contended that the board of trustees could not delegate to the advisory board power to fix Mr. Richardson's compensation, either as to the 2½ per cent commission or as to the 5 per cent commission for the liquidation of the affairs of the company. The defendant does not contend that the advisory board necessarily had such power, nor does it necessarily rely upon the approval of this compensation by the advisory committee. It relies upon the affirmative action of the board of trustees as above stated. However, we do contend that the board of trustees could appoint the advisory board as its agent to fix the compensation of the officers of the company, but such action would always be subject to review by the board of

trustees under the decisions of the Supreme Court of Washington. Until the board of trustees disapproved the action of its agent, the advisory board, in fixing the compensation of an officer, the action of the agent would be binding upon the corporation. There is no proof that there was ever any disapproval of this compensation by any action of the board of trustees.

The testimony of Mr. Richardson, Mr. Davis and Mr. Moore establishes the fact that a resolution was adopted at the regular meeting of the board of trustees held on the 31st of May, 1918, although the same was not spread upon the minutes. (Testimony of B. A. Moore, Trans. p. 166; testimony of Rufus Davis, Trans. p. 184; testimony of Charles Richardson, Trans. p. 145.) And the same witnesses testified that the payment of the 5 per cent commission was approved at a meeting of the board of trustees held in August, 1918 (Trans. pp. 166, 167), and again on January 7, 1919, where the resolution was spread upon the minutes. The payment of this commission was therefore authorized by the affirmative action of the board of trustees of the corporation. The evidence introduced fully justified the jury in finding that such approval of the payment of the 5 per cent commission was made by the

board of trustees of the corporation at meetings of the board of trustees, duly and regularly called. This court will not set aside the verdict of the jury if there is any competent evidence to support the verdict, and there is an abundance of evidence to show that the fixing of the commission of 5 per cent for liquidation was approved and authorized by the board of trustees prior to the rendition of this service. However, the defendant is not compelled to rely upon such affirmative proof of the making of an express contract for the payment of this commission. The fact that such a contract was made is clearly established by the evidence and if it were not established by the evidence, still the defendant would be entitled to the commission upon the principle of a *quantum meruit.*

QUANTUM MERUIT

Article II of the by-laws of the company is as follows:

"ARTICLE II. DUTIES OF PRESIDENT.

"Section 1. It shall be the duty of the president to preside at all meetings of the directors and shareholders, and to sign, with the secretary, all bonds,

deeds, certificates of stock, promissory notes, or other instruments in writing, made or entered into by or on behalf of the company.

"Section 2. He may be removed from such office at any time by a majority of the board of trustees.

"Section 3. He may receive such remuneration as the board of directors may, from time to time, determine." (Plaintiffs' Exhibit No. 1, Minute Book, page 53.)

The foregoing is the only provision in the by-laws of the corporation defining the duties of the president. He is not even made the manager of the corporation. He is not given authority in the by-laws to make any contracts or to sell any property or to wind up the affairs of the corporation. His duties are merely to preside at the meetings of the trustees and stockholders and to sign contracts, deeds and bonds when authorized by the board of trustees. The by-laws also provide that the president shall receive such remuneration as the board of trustees may from time to time determine.

Under the management of the defendant, the corporation paid to its stockholders the sum of $1,300,-000 in dividends and returned in addition upon the liquidation of the company, the sum of $1,050,-000.00, after the payment of all expenses. The by-

laws, however, impose no special duties either upon the president or upon any director. Of course the board of directors, as a body is charged with the usual duty of the care of the affairs of the corporation. All of the duty and power cast upon them was as a board and not individually.

The Pacific Cold Storage Company was organized in the year 1900 and continued in business until it was dissolved on June 2, 1919. It had offices at Tacoma, Washington and branches at Fairbanks, Nome, Fort Gibbon, Dawson, Ruby, St. Michael, Iditarod, Alaska, Gleichen and Glasgow. It carried on operations throughout Alaska and in the province of Alberta. It owned ranches in Alberta and had, just prior to the commencement of the liquidation, about 5,000 head of cattle. It was engaged in the farming business and during the war raised annually from 15,000 to 20,000 bushels of wheat. It owned and operated steamers and cold storage plants in Alaska and in the State of Washington. Its business extended over the whole of the northern country. Its assets exceeded $1,000,000.00. The management of this property was carried on under the management of the board of trustees. The president was not charged with its management by the by-laws of the company. There is a vast differ-

ence between the management of a corporation and the sale of its assets, their conversion into money, the collection of the same and the distribution of the proceeds of the sale of its assets among its stockholders. It is plain that no president of a corporation has the power to sell its entire assets or to convert them into money and distribute the proceeds among the stockholders. The liquidation of a corporation is distinct from the management of its ordinary affairs.

The rule of law is practically universal that if services rendered by an officer of a corporation are outside of the general scope of his duties as such officer, he may recover upon a *quantum meruit*, even though his compensation for the performance of such services were not previously fixed by the board. It must be shown before a recovery can be had upon an implied promise:

"* * * not only that the services were valuable, but also that they were rendered under such circumstances as to raise the fair presumption that the parties intended and understood that they were to be paid for; or at least, that the circumstances were such that a reasonable man, in the same situation with the person who receives and is benefited by them, would and ought to understand that compensation was to be paid for them."

Construction Co. v. Fitzgerald, 137 U. S. 98.

As early as May 1, 1917, the evidence shows that the British stockholders, as well as the American stockholders were seriously considering the liquidation of the company. The liquidation had evidently been discussed by the board of trustees and by the advisory board and the matter of the compensation of the defendant for the liquidation of the company had been considered. In a letter written by the advisory board dated May 1, 1917 (Defendant's Exhibit No. 16), occurs the following:

"Regarding the cost of winding up, the advisory board do not anticipate that there will be any difficulty whatever in arranging same with you, but the question can not be disposed of summarily. They quite realize your position and they are sure that the shareholders here would wish to deal reasonably with you. From what experience the advisory board have had they rather think that a charge which a liquidator here would be allowed would be about 5 per cent (the sum you mention) on such of the fixed or permanent, as apart from liquid assets, as could not or would not be sold in the ordinary course of business. He would not, of course, have any salary, and he would only retain such of the managers and clerks so long as they were necessary for the carrying on of the business. Thereafter the winding up would be conducted by his own staff. In this case a good deal would depend upon the course which the liquidation takes and the sum of the salaries and office expenses requiring to be paid. You

might be good enough to write me further on this subject."

Again, on July 12, 1918, the defendant wrote to Mr. David Inglis in reference to his compensation (Defendant's Exhibit 18-A), and the advisory board answered this letter by wire, agreeing to the remuneration of 5 per cent suggested by the defendant in his letter of July 12, 1918. This was confirmed by a letter from Mr. David Inglis dated August 21, 1918. (Defendant's Exhibit 18-A.) The letter of May 1st was in answer to a letter of the defendant to Mr. Inglis dated March 30, 1917. (Defendant's Exhibit 15-A.) And on April 22, 1918, we find further correspondence on the same subject, all showing that the defendant as well as the corporation understood that the services of liquidation were separate and distinct from those of ordinary management and that the defendant should be paid a compensation of 5 per cent for the liquidation of the company, which was expected to take from one to three years. The services rendered by the defendant were certainly rendered under such circumstances as would lead a reasonable man to assume that they were to be paid for, and at a reasonable rate. These services are shown by the testimony to be valuable. Mr. Richardson, Mr. Moore and Mr.

Davis all testified that the liquidation was an extremely fortunate one and very much better for the stockholders than could have been realized at any time thereafter. (Trans. pp. 135, 161, 178, 195.)

L. R. Manning, Chester Thorne, Eugene Wilson and Ralph Stacy, all experienced business men, testified that the value of the services for liquidating the company would be approximately 10 per cent upon the amount returned to the stockholders. (Trans. pp. 175, 176, 177, 178, 195.) All of the work of liquidation was done under the immediate direction of the defendant. This is shown by the testimony of Mr. Richardson, and particularly by the testimony of Rufus Davis. (Trans. pp. 179, 185, 188.) Mr. Davis said (Trans. p. 188), that it was an exceedingly good liquidation.

"I do not think there has been a day since we started on that liquidation we could have gotten as much money for the assets as we got at that time. I think there was both energy and brains put into it, and that in addition to that, there was considerable good fortune coming our way."

He further said that Mr. Richardson put his time and usual energy into the matter of liquidating the assets and did his work as speedily as possible and got every cent there was in it; that the time at

which it was sold was a fortunate item and that the defendant selected that time. As to the nature of the services rendered by the defendant, we respectfully ask the court to read his testimony and the testimony of Rufus Davis. The services were valuable and they were rendered under such circumstances as to raise the fair presumption that both parties understood that they were to be compensated for. They were also rendered outside the scope of the duties of the president as fixed by the by-laws. The following authorities sustain our position:

"It is almost the universal rule that a director or officer rendering services outside the scope of his official duties may recover compensation therefor although not provided for by express contract if the circumstances are otherwise such as to raise an implied contract, and this rule seems entirely fair and proper. It puts directors, as to services rendered by them to the corporation, outside the scope of their official duties, in exactly the same position as any other stockholder, or for that matter, any person unconnected with the corporation who performs services which he is not bound to perform and which the corporation accepts under the circumstances which make it only just that it render compensation therefor."

Goodin v. Dixie Portland Cement Co., 1917F, L. R. A., page 319.

"A director of a corporation may recover services on quantum meruit from the latter for services rendered clearly outside his duties as a director."

Ruby Chief Mining Co. v. Prentice, 52 Pacific 210.

"Under the later and better reasoned cases for such services a recovery may be had either under an express or implied contract."

Stock Co. v. Toponce, 152 U. S. 405; 14 S. Ct. R. 633.

Brown v. Silver Mines, 30 Pacific 66.

"Neither the charter nor the by-laws of a corporation cast any special duties on a vice president or a director. The vice president is only required to act in the absence of the president and no special duties or management were in terms cast upon the president. It was provided that he preside at all meetings, sign all certificates of stock, contracts, checks, etc., 'and generally do and perform such other duties as are incidental to his office and not in conflict with its by-laws and articles of association.' No duty was cast on any individual director as such.

"The board of directors as a body is charged with the usual duty of care of the affairs of the corporation and all the power and duty cast upon them was upon them as a board and not individually. Obviously therefore, under the testimony which we have referred to from the plaintiff and the foreman of

the ranch, the services which the plaintiff performed were not those of a director or vice president, but outside thereof and similar to those of a general manager."

Corinne Mill Co. v. Toponce, 14 S. Ct. Rep. 633; 152 U. S. 405.

In the case of *Burns v. Commencement Bay Land Company*, 4 Wash. 566, the court stated that an officer or director was entitled to recover upon an implied contract for services rendered outside the scope of his employment and the court cites with approval the case of *Ten Eick v. Pontiac*, 74 Michigan 299, 16 A. S. R. 633, where an attorney who was a director and officer of a corporation was allowed to recover for his services as attorney. This case was to the same effect where the court says:

"A general creditor can defeat the allowance of preferred claims for labor performed by various stockholders in the capacity of employees within six months of the appointment of a receiver, by an objection to the validity of the stockholders' resolution fixing certain compensation for such stockholders, where there was sufficient evidence to sustain the finding that the resolution was never acted upon by the corporation and was waived by the stockholders and that they were regularly credited with the reasonable value of the services rendered by them and the conclusion of law that they were entitled to preferred claims was proper."

In the case of *Dial v. Inland Logging Co.*, 52 Wash. 85, the court cites with approval the case of *Brown v. Republican Mt. Silver Mines*, 30 Pacific 66, and approves the Burns case.

"An officer and stockholder only owning two shares of stock who is employed to work for the company is presumed to be entitled to reasonable wages which he may recover or offset upon showing the rendition and value of the services, and where a corporation made salaried payments to each of its officers from time to time, an officer devoting all of his time to the business as president and general manager is entitled to offset any balance due for wages at their reasonable value against the value of material sold to him by the corporation."

Argo Manufacturing Co. v. Parker, 52 Wash. 100.

In the case of *Blom x. Blom Codfish Co.*, 71 Wash. 41, the court held:

"Where a president and trustee of a corporation rendered services as a general manager with the consent of the other officers, he can recover on an implied contract for services as general manager without any express contract therefor."

The court further said:

"The rule relating to the allowance of reasonable compensation for services, performed for a corporation by a person who is also an officer of the corporation, when such services are rendered apart

from the duties incident to such office, is stated in 3 Clark and Marshall on Private Corporations, p. 2053, as follows:

" 'By the overwhelming weight of authority, the doctrine that the directors and other managing officers of a corporation are not entitled to compensation, in the absence of express provision or agreement therefor, does not apply to unusual or extraordinary services—that is, services which do not properly pertain to their office, and are rendered by them outside of their regular duties. If such services are rendered by a director or other officer at the request of the corporation or board of directors, with the understanding that they are to be paid for, the law will imply a promise, in the absence of any special agreement, to pay what they are reasonably worth.'

"Appellant contends that the evidence as to the alleged services for which the $8,000 was allowed falls far short of showing that they were outside of the line of his duty as an officer and director of the company. There is no evidence that the president or any of the members of the board of directors was bound to perform any duties in addition to those usually performed by like officers in similar corporations. Without attempting to enumerate the ordinary duties of such officers, it is sufficient to say that the services performed by defendant Wallace were largely in excess of those which he was bound to perform as an officer of the corporation. It appears from the testimony that Wallace spent a great deal of time and rendered valuable services to the company; that he saved the company's entire property from being sold under execu-

tion and under decrees to satisfy miners' and mechanics' liens; that he undertook the placing of the stock of the company; that he assumed the entire supervision of the tunnel work and disbursement of the funds, the employment of men, and the making of contracts. His services differed from the other officers of the company, in that he devoted almost his entire time for a portion of each year to the financing and management of the corporation affairs. He was put to much expense in railroad and traveling expense. He gave of his stock to others and secured their assistance, including the 3,750 shares presented to plaintiff. Obviously therefore, under the testimony, the services which the plaintiff performed were not those of a director or president, but outside thereof and similar to those of a general manager."

Gumaer v. Cripple Creek Co., 90 Pacific 85.

"The general manager of a corporation, who is also a director, has a legal claim for the value of his services although there has been no resolution of the board of directors or any express contract fixing his compensation, where he devotes his entire time to the business, and his duties are numerous and onerous, and not such as pertain to his office as director.

"In a suit to hold directors of a corporation liable for money paid to one of their number for services under a resolution invalid because passed at a meeting at which his presence was necessary to constitute a quorum, they should be credited with an

amount equal to what the services are reasonably worth."

Bassett v. Fairchild, 52 L. R. A. 611.

"It has been held that directors of corporations cannot, without previous express contract, receive compensation for such ordinary services as are usually rendered by directors without pay; for the common understanding, as declared by judicial decisions, is that such services are presumed to be rendered gratuitously. But that presumption does not apply to those onerous services performed by officers and agents of a corporation, though they be also directors, for which compensation is usually demanded and allowed, and which could not reasonably be expected to be performed for nothing."

Bassett v. Fairchild, 52 L. R. A. 615 (citing Constructing Co. v. Fitzgerald, 137 U. S. 98).

"A bank or other corporation may be bound by an implied contract in the same manner as an individual may. But in any case, the mere fact that services are rendered for the benefit of a party does not make him liable upon an implied promise to pay them. It often happens that persons render services for others which all parties understand to be gratuitous. Thus, directors of banks and many other corporations usually receive no compensation. In such cases, however valuable the services may be, the law does not raise an implied contract to pay by the party who receives the benefit of them. To render such party liable as a debtor under an im-

plied promise, it must be shown not only that the services were valuable, but also that they were rendered under such circumstances as to raise the fair presumption that the parties intended and understood that they were to be paid for; or at least, that the circumstances were such that a reasonable man, in the same situation with the person who receives and is benefited by them, would and ought to understand that compensation was to be paid for them."

Bassett v. Fairchild, supra.

"Where the president of a corporation performs services outside of his official duties, the fact that he received no salary as president, and that there was no resolution of the board of directors containing an agreement to employ and compensate him for such extra services, was not conclusive evidence that he was to receive no pay, since a formal resolution was not essential to his recovery.

"Where the only duties of a president and director of a corporation were to preside at meetings and act as ex-officio member of committees, it was competent for the board of directors to employ him to perform services in procuring a lien to prevent foreclosure proceedings on corporate property and legal services in connection therewith, for which he was entitled to recover compensation, since as to such services he holds no trust relation towards the corporation."

Bagley v. Carthage Ry. Co., 58 N. E. 895.

"Neither is it essential to the plaintiff's right of recovery that he should have been employed under a formal resolution of the board. It is sufficient, if, from the nature of the employment, the importance of the subject-matter, and the action of the directors of the corporation, the inference is authorized of the employment as alleged.

"It is clear that there was a fair understanding with the creditors in the very beginning that Sackett should have $1,200 per year for his services outside of his official duties as director and secretary and treasurer. A binding contract for compensation for such services to one who is at the time an officer or director in the corporation may be made without any formal resolution. Whatever may have been said in prior cases, this is now the settled law of the state of New York and of the United States courts."

In re Gouverneur Pub. Co., 168 Fed. 115.

The United States Circuit Court of Appeals for the Ninth Circuit, in the case of *Montana Mining Co. v. Dunlap*, 196 Fed. 612, has expressly recognized the right of an officer of a company to recover reasonable compensation for his services even though there were no formal resolution or agreement for compensation fixed by the board of directors in advance and the court approves the language of the court in the case of *The National Loan Co. v. Rockland Co.*, 94 Fed. 335, as follows:

"But such officers who have rendered their services under an agreement, either express or implied, with the corporation, its owners or representatives, that they shall receive reasonable, but indefinite, compensation therefor, may recover as much as their services are worth; and it is not beyond the powers of the board of directors to fix and pay reasonable salaries to them after they have discharged the duties of their offices.

"A resolution adopted by the board of directors of a corporation reciting that an officer of the corporation had in the past performed certain services outside the scope of the duties of his office for which he was entitled to compensation is competent evidence in a subsequent suit by the officer to recover for such services as an admission of fact by the corporation, although the resolution was passed in an effort to compromise the claim."

Montana Mining Co. v. Dunlap, 196 Fed. 612.

"An officer or director of a corporation may recover fair and reasonable compensation for services rendered for the corporation outside the scope of his official duties, although there was no express contract therefor, if the services were rendered under such circumstances as to raise the fair presumption that the parties intended and understood that they were to be paid for.

Montana Mining Co. v. Dunlap, supra.

In the last named case the officer examined certain records in the main office and attended the

hearing before a coroner regarding the death caused by the negligence of the corporation.

"The director of a construction company who acts as superintendent, treasurer and general manager, performing, with the knowledge of the company, services not pertinent to his office as director can recover the reasonable worth of the services."

Fitzgerald v. Mallory Construction Co., 137 U. S. 98, 11 S. Ct. Rep. 36.

In that case the president went to the expense and trouble of procuring money for the company and acted as manager and superintendent and procured rights of way, superintending the doing of the work, hiring of the men and subletting of contracts, etc., which were matters not at all pertaining to his office as director.

Counsel for the plaintiff contends, in his brief page 49, and subsequent pages, that the board of trustees of the Pacific Cold Storage Company authorized the payment of the 5 per cent commission after the rendition of the services and that the fixing of this compensation of 5 per cent was in payment of services performed by the defendant which were within the ordinary scope of his duties as president of the corporation. This is not borne out by the evidence. The plan for the liquidation of the

company was practically agreed upon prior to the 1st of May, 1917, as shown in the letter of May 1, 1917, above referred to. The amount of the compensation is shown to have been considered. The board of trustees on the 31st of May, 1918, unanimously approved the payment of this compensation of 5 per cent. Prior to that time the steamer "Elihu Thompson" had been sold for $142,500.00, and certain other property had been sold to Waechter Bros. for $160,000. There was realized from the sale to Waechter Bros. a small amount in cash and about $90,000 in long time notes, which were afterwards negotiated by the corporation to the National Bank of Tacoma without recourse against the corporation, although Mr. Richardson guaranteed the payment of the notes personally. There was something like $150,000 cash realized from the sale to Waechter Bros. and of the "Thompson" prior to May 31st; the liquidation of the remaining assets aggregating in value more than $900,000, took place after the 31st of May, 1918, but the sale of the "Thompson" and the sale to Waechter Bros. was in pursuance of the plan outlined in the letter of May 1, 1917. The sale of these assets was clearly a part of the liquidation plan as was consummated on the 31st of May, 1918.

So that the board of trustees clearly authorized the payment of the 5 per cent commission prior to the liquidation of at least $900,000 of the assets of the corporation. This statement is supported by the testimony of Mr. Moore, Mr. Davis and Mr. Richardson and was sufficient to justify the jury in reaching the conclusion that the agreement for the payment of the 5 per cent commission was made prior to the rendition of the services. We will not prolong this brief by specific references to the testimony, but will ask the court to read upon this point, the entire testimony of Mr. Richardson, Mr. Davis and Mr. Moore.

The authorities cited by counsel under his subdivision "Back Pay Rule," plaintiff's brief, pages 49 to 78, are inapplicable in the light of the record. Counsel contends, page 51 of his brief:

"Directors of corporations can not recover for services rendered the corporation as other officers unless upon a contract or resolution passed by the corporation, or by a vote of the board of directors in which they take no part, or upon some provision made for such compensation, made in the charter or by-laws, all of which must be before such services are rendered."

The authorities cited by counsel do not sustain the contention. There is always an exception in

case the services rendered were outside the scope of the ordinary duties of the officer and the authorities which we have cited abundantly establish this exception. Moreover, the great weight of authority sustains the proposition that payment for the services may be recovered upon an implied promise if it be shown that the services were valuable and that they were "rendered under such circumstances as to raise the fair presumption that the parties intended and understood that they were to be paid for, or at least that the circumstances were such that a reasonable man in the same situation with the person who receives and is benefited by them would and ought to understand that compensation was to be paid for them." (*Construction Co. v. Fitzgerald*, 137 U. S. 98; *Bassett v. Fairchild*, 52 L. R. A. 615.)

Counsel, brief page 54, cites the case of *Burns v. Commencement Bay*, 4 Wash. 558, in support of his position, but the court stated in that case that an officer or director was entitled to recover upon an implied contract for services rendered outside the scope of his employment. This doctrine was upheld by the Supreme Court of Washington in *Argo Mfg. Co. v. Parker*, 52 Wash. 100, and in the later case of *Blom v. Blom Codfish Co.*, 71 Wash. 41. In the Blom case the court held:

"Where a president and trustee of a corporation rendered services as a general manager with the consent of the other officers, he can recover on an implied contract for services as general manager without any express contract therefor."

Counsel, brief page 59, cites the case of *Wonderful Group Mining Co. v. Rand*, 111 Wash. 557, where the court held that there was a conspiracy on the part of the directors to vote themselves salaries for past services and that such action was based upon the fraud of the directors. In that case, however, it appears that the services were not rendered under such circumstances as would raise a presumption that the parties understood that they were to be paid for. In nearly all of the cases cited by counsel in support of his position, examination of the cases will disclose that the payment of back salaries was improper for the reason that the services were not rendered under such circumstances as would raise a presumption that the parties understood that they were to be paid for.

In this case we have shown that from May 1, 1917, onward, it was clearly understood by the board of trustees and by the advisory committee, as shown by the correspondence, that it was contemplated that the defendant should receive a compen-

sation of 5 per cent. The evidence shows that throughout the life of the corporation the recommendations of the advisory board were approved by the board of trustees of the company and the defendant had the right to rely upon the assumption that he was to liquidate the company and to receive compensation therefor.

We do not deem it necessary to analyze the cases cited by counsel in support of his "Back Pay" contention. They can all be distinguished upon the grounds that we have heretofore stated and as set forth in the case of *Construction Co. v. Fitzgerald*, 137 U. S. 98.

Counsel, brief page 78, contends that the plaintiff should have recovered on the first and second causes of action under the "Back Pay Rule" and he refers to the testimony of Mr. Denman that the 2½ per cent commission was paid under the authority of the advisory committee, but counsel overlooks the fact that this 2½ per cent commission was set up in the annual reports prepared by the certified accountants and in the addenda thereto prepared by the plaintiff and that these reports were approved by the board of trustees and by the stockholders annually. And he also overlooks the fact that at the meeting of the trustees immediately after the ad-

journment of the stockholders' meeting each year, the testimony discloses that the 2½ per cent commission was authorized before the services were rendered.

On page 79 of plaintiff's brief, it is contended that the court erred in refusing to give instruction No. 1 requested by the plaintiff. Counsel, however, fails to state his ground for the contention. Under the authorities cited by counsel for the plaintiff it is manifest that the instruction does not correctly state the law in the light of the evidence. In any even there was evidence sufficient to go to the jury as to the passage of a prior resolution and plaintiff himself, constantly, each year from 1912 to 1918, approved the payment of the 2½ per cent commission referred to in his requested instruction No. 1. In view of these circumstances, the giving of such instructoin would have been erroneous.

On page 80 of plaintiff's brief, it is asserted that the court committed error in permitting eight witnesses to testify as to the reasonable value of the services rendered by the defendant in liquidating the corporation. As we have heretofore shown, the services rendered by the defendant in the liquidation of the corporation were outside the scope of his duties as president of the corporation and that

under such circumstances it was entirely proper under the authorities cited, to admit such testimony.

On page 81 of plaintiff's brief, it is contended that the court erred in refusing to give the instruction set forth on said page. The evidence shows that on September 15, 1918, the company had on hand $237,000 in cash; that checks were sent out for the dividend declared at that time but that it took from twenty to thirty days before the checks that were sent to Great Britain were returned to the bank in Tacoma upon which they were drawn, and that the company expected to, and did convert into cash the other assets so as to make up the $500,000. The checks, however, were not paid until after the lapse of about thirty days, or sometime in the month of October. (Trans. 163.) The evidence as we have before shown clearly establishes the fact that the board of trustees authorized the payment of the 5 per cent commission on May 31, 1918, and again in August, 1918, before the services were rendered, and the evidence also shows that from May 1, 1917, both parties understood that these services of liquidation were to be performed by the defendant and that he was to be paid 5 per cent upon the amount returned to the stockholders.

(See letter of May 1, 1917, Defendant's Exhibit 16-A.) The instruction would have been improper in view of the evidence that had been admitted. The instruction was erroneous for another reason. The instruction requested the court to instruct the jury that the plaintiff was entitled to recover on both the third and fourth causes of action. As to the fourth cause of action, amounting to $1995.00, the claim is based upon the Charles A. Miller stock of 798 shares. Miller had voted in favor of the payment of the commission of 5 per cent on May 31, 1918, and had seconded a resolution approving its payment on January 7, 1919, at which time Miller was the owner of the stock. The plaintiff did not acquire the stock until after the passage of the resolution of January 7, 1919, and he bought it with full knowledge of the fact that Miller had seconded the resolution approving its payment and reciting that it was a reasonable compensation for the valuable services rendered by the defendant. The court committed no error in refusing to give such instruction.

On page 82 of plaintiff's brief, it is said that if it was legal for the defendant to receive a salary of $1,000 per month, it was illegal for him to receive additional compensation of 5 per cent. The

services for his salary covered the ordinary services of the president of the company. The commission covered services for the liquidating of the company, which were entirely distinct and apart from services rendered as president of the company. Under the authorities which we have cited the board of trustees had the right to pay additional compensation for such extraordinary services connected with the liquidation. But, even though no resolution had been adopted, there was an implied promise to pay the reasonable value of such services. They were rendered under such circumstances as would lead the defendant, as well as the corporation to understand that the services for liquidating the corporation were to be paid for.

On page 85 of plaintiff's brief, it is contended that the court erred in refusing to give the instruction set forth on said page requested by the plaintiff. The refusal to give such instruction was proper and it would have been an error to have given the instruction requested in view of the testimony that went to the jury that Miller was present at the meeting of the trustees held on May 31, 1918, and voted in favor of the payment of the 5 per cent commission. The instruction was erroneous for the further reason that Miller, the holder of the stock

on January 7, 1919, expressly approved the payment of the commission, both as to the distributions made prior to and subsequent to January 7, 1919, and the plaintiff bought the stock with this knowledge.

The plaintiff also complains on page 87 of his brief of the instructions given by the court. We ask the court to read the entire instructions given by the court. (Trans. 199-215.) The instructions clearly and correctly stated the law of the case to the jury and we think it would be useless to comment upon the instructions given by the court. Even if there were any error in such instructions given by the court, it was harmless error for the reason that the complaint did not state a cause of action and for the reasons hereinbefore stated. The plaintiff could acquire no greater rights as to any recovery upon the Miller stock than Miller had. Clearly Miller was estopped by his actions from claiming that the payment of the commission of 5 per cent was improper. He expressly recited in the resolution which was adopted on January 7, 1919, that the services were valuable and that the 5 per cent commission was reasonable and just.

On page 93 of plaintiff's brief it is urged that the court erred in not permitting the plaintiff to

show by Miller that he (Miller) did not know of the salary of $1,000 per month and did not know of the 2½ per cent commission that had been paid to the defendant for years and that he was taken by surprise when he seconded the resolution of January 7, 1919. The evidence shows that Miller had been a trustee for several months and had been a stockholder for years. The record shows that Miller attended stockholders' meetings at various times and was present when the accountant's reports and the addenda of Denman were submitted to the stockholders and approved by them. A stockholder is charged with the knowledge of what the books and records of the corporation show, and cannot be heard to say that he did not have such knowledge, especially in view of the fact that the evidence shows that Miller attended stockholders' meetings and was present when the accountant's reports were approved.

On page 99 of plaintiff's brief the contention is made that Moore, and Davis were interested parties and voted in favor of the resolution of January 7, 1919. We submit that the evidence does not show that they were in any wise interested in the result of the passage of such resolution approving the payment of the 5 per cent commission. Moreover,

the minutes of the meeting of January 7, 1919, show that Trustees Stacy, Miller, Seddon, Moore, Davis and Richardson were present and that the resolution was approved by all of the parties, including Miller. The fact that Moore and Davis were receiving a salary from the company and were to be paid for a part of their liquidating work by Richardson does not disclose such an interest in the passage of the resolution that would have any effect upon its legality.

On page 26 of plaintiff's brief and subsequent pages, it is contended that a majority of the board of trustees at the meeting of May 31, 1918, did not vote in favor of the payment of the commission of 5 per cent to the defendant. We call the court's attention to the meeting of May 31, 1918 (Minute Book, page 288). The minutes show that Charles Richardson, R. J. Davis, C. A. Miller and B. A. Moore were present. There were never at any time more than seven members of the board of trustees. Four members constituted a quorum and a majority of the quorum had the right to take such action as was deemed necessary in conducting the business of the company. On page 56 of the minute book, the by-laws expressly provide, "A majority of the board shall constitute a quorum for the transaction

of business." The meeting of May 31st, was therefore a legal meeting and the resolution approving the payment to the defendant of the commission of 5 per cent for the liquidation of the company was approved by a majority of the board.

CONCLUSION

Neither the Pacific Cold Storage Company nor its liquidating trustees were made parties to this action. They were indispensable parties. No demand or request was made upon the corporation or the liquidating trustees to institute this action against the defendant. There is no allegation in the complaint and no proof that any effort was ever made to induce the trustees of the company to bring the action. There is no allegation that such a demand would have been fruitless. There is no proof or allegation that the defendant dominated the affairs of the corporation or the liquidating trustees. The complaint fails to state the cause of action.

The plaintiff, as the owner of sixty shares of stock, had knowledge of the payment of the 2½ per cent commission to the defendant for many years prior to the bringing of the action. He voted

as a director in favor of its payment, and actually drew and signed checks in payment of the 2½ per cent commission on a number of occasions. The plaintiff, as the representative of the Miller stock, could acquire no greater rights than Miller had. Miller had knowledge of the payment of the 2½ per cent commission for years and is estopped to claim any portion of the 2½ per cent commission. As to the 5 per cent commission on the Miller stock he is estopped to claim any portion of the 5 per cent commission. The plaintiff stands in the same position. The action is barred by the statute of limitations. The proof clearly sustains the action of the court in granting the non-suit and likewise sustains the verdict rendered by the jury. The services rendered by the defendant in the liquidation of the company were duties outside of the scope of his duties as president. The services were rendered under such circumstances as would lead both parties to understand that the services were to be paid for. The amount of the commissions, both as to the 2½ per cent and the 5 per cent commission was authorized by the board of trustees of the company prior to the rendition of the services. There can be no question as to the value of the services. Eight or ten witnesses testified that the services were worth more than the amount paid to the defendant.

The services were valuable, the liquidation was successful, and by reason of the ability and efforts of the defendant the stockholders of the company received far more than they could possibly have received had the liquidation been made later and under different circumstances or at a time not determined upon by the defendant. The defendant stated at the time he was employed to liquidate the company that it might take one, two or three years of his time; that he would not engage in any other business until the liquidation was completed and would pay his own expenses of the liquidation other than the services of Davison and Moore. All of the stockholders, with the exception of the plaintiff, approved the payment of these commissions. It is true that the liquidation was completed with unusual rapidity, being consummated in something over a year after the commencement of the liquidation process. It might have taken years had it not been for the genius and ability of the defendant. If the time of liquidation had been extended for three years, the salary would have been comparatively little more than the defendant had been receiving for years, including the 2½ per cent commission. The compensation was not disproportionate to the value of the services, particularly when viewed in

the light of the successful winding up of its business. We do not think that the lower court committed any errors, either in his instructions or as to his rulings in the admission of testimony. It was stipulated between the parties that all correspondence and communications between the defendant and the Pacific Cold Storage Company and Davis Englis, the secretary of the advisory committee in Scotland, might be admitted in evidence without any objection except as to relevancy, competency and materiality. The stockholders at all times knew of the agreement for the payment of the commissions and the plaintiff and Miller knew of the agreement better than anyone else. Their means, knowledge and information were far better than those of any other stockholder. There is no evidence of any fraud or over-reaching upon the part of the defendant. Their entire transaction, with reference to the payment of commissions, was conducted openly and frankly, as shown by the letter of May 1, 1917, and by all of the subsequent correspondence.

The action is one in equity and it was the duty of the court to determine the facts. There is no evidence to sustain the contention that the plaintiff has been wronged in any way. The judgment of the lower court was abundantly supported by the testimony.

Under the authorities which we have cited and for the reasons heretofore set forth, we respectfully contend that the judgment of the lower court was correct and that the defendant is entitled to the judgment of this court affirming the action of the lower court.

Respectfully submitted,

KERR, McCORD & IVEY,
Attorneys for Defendant in Error.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FREDERICK L. DENMAN, *Plaintiff in Error,* vs. CHARLES RICHARDSON, *Defendant in Error.*	No. 3993

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

REPLY BRIEF OF PLAINTIFF IN ERROR

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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FREDERICK L. DENMAN, *Plaintiff in Error,* vs. CHARLES RICHARDSON, *Defendant in Error.*	No. 3993

This court has not jurisdiction to consider that part of the brief of defendant in error, commencing on page 32 (thirty-two) and ending on page 57 (fifty-seven), and the first paragraph under the heading "Conclusion" on page 112(one hundred and twelve), wherein he is complaining of errors of the lower court in not sustaining his demurrer to the complaint and in not holding that this was a law, and not an equity action, for the reason that the defendant in error is there attempting to argue in this court points that were raised by him in the lower court by motions and demurrers, and which were all decided adversely to him by the lower court in written opinions after exhaustive briefs and from which decisions the defendant in error has not appealed, and which points are not embraced in the assignments of error of the plaintiff in error.

Errors prejudicial to appellees or respondents not appealing can not be considered.

Rockford Shoe Co. v. Jacobs, 6 Wash. 421; 33 Pac. 1057;

Sitton v. Dubois, 14 Wash. 624; 45 Pac. 303;

Pepperal v. City Park Transit Co., 15 Wash. 176; 45 Pac. 743;

Tacoma v. Tacoma Etc. Co., 17 Wash. 458; 50 Pac. 55;

Whiting v. Doughton, 31 Wash. 337, 71 Pac. 1026;

Watson v. Sawyer, 12 Wash. 335; 40 Pac. 413;

Lawyer's Land Co. v. Steel, 41 Wash. 411; 83 Pac. 896;

Sullivan v. Seattle Elec. Co., 44 Wash. 53; 86 Pac. 786;

Winningham v. Philbrick, 56 Wash. 38; 105 Pac. 144;

Kosch V. Nitzky v. Hammond Lbr Co., 57 Wash. 320; 106 Pac. 900;

Thompson v. Koch, 62 Wash. 438, 113 Pac. 1110;

Perolin Co. v. Young, 65 Wash. 300 ;118 Pac. 1;

Akers v. Lord, 67 Wash. 179; 121 Pac. 51;

Grant v. Huscke, 70 Wash. 174; 126 Pac. 416;

Hammond v. Hillman, 73 Wash. 298; 131 Pac. 641;

Augerson v. Seattle Elec. Co., 73 Wash. 529; 132 Pac. 222;

Jones v. Grove, 76 Wash. 19; 135 Pac. 488;

Burgess v. Peth, 79 Wash. 298; 140 Pac. 351;

Duffy v. Blake, 91 Wash. 140; 157 Pac. 480;

Booth v. Bassett, 82 Wash. 95; 143 Pac. 449;

Bremerton v. Bremerton Water & Power Co., 88 Wash. 362; 153 Pac. 372;

Simmons v. N. P. R. Co., 88 Wash. 384; 153 Pac. 321;

Shanstrom v. Case, 103 Wash. 672; 175 Pac. 323;

Swager v. Smith, 194 Fed. 763, 765;

Philadelphia Casualty Co. v. Theckheimer, 220 Fed. 401, 418;

Bolles v. Outing Co. (U. S. Supreme Ct.) 44 L. Ed. 156, 158;

Thus in *Swager v. Smith,* 194 Fed. 763, it was held that

> "Mere assertion of error in appellee's brief, where no cross appeal was taken, was insufficient to confer jurisdiction on the appellate Court to review the error alleged."

And the Court in this case on page 765 uses the following language:

> "The appellees have not taken a cross appeal. Mere assertion of error in an appellee's brief does not give this Court jurisdiction to review alleged error against an appellee."

and the Court cites a mass of Supreme Court decisions sustaining the proposition.

Again in the case of *Philadelphia Casualty Co. v. Theckheimer,* 220 Fed. 401, it was held that

> "A defendant in error, who did not himself institute proceedings in error, cannot in the appellate court go beyond supporting the judgment and opposing the assignments of error by the adverse party."

and the Court on page 418 uses the following language:

> "Plaintiffs complain of certain rulings of

> the Court, but as they did not appeal from the judgment, they cannot in this Court go beyond supporting such judgment and opposing every assignment of error."

and the Court having sustained such proposition quotes a mass of Federal and Supreme Court decisions.

Again in the case of *Bolles v. Outing Company,* 44 L. Ed. 156, it was held that

> "A defendant who did not take out a writ of error cannot be heard to complain of any adverse rulings in the Court below, on writ of error taken by the plaintiff,"

and on page 158, near the bottom, uses the following language:

> "It is sufficient to say of these that the defendant did not take out a writ of error and cannot now be heard to complain of any adverse rulings in the Court below,"

and the Court cites a mass of Supreme Court decisions to sustain its statements.

The decisions sustaining this proposition all over America are legion and we will not attempt to cite all of them, but call the Court's attention only to the following:

Benson v. Bunting, (Cal.) 75 Pac. 59;

Reese v. Damato, (Fla.) 33 So. 462;

Adams v. Long, (Ill.) 114 Ill. App. 277;

Remster v. Sullivan, (Ind.) 75 N. E. 860;

J. P. Calnan Const. Co. v. Brown, (Iowa), 81 N. W. 163;

Gregory v. Root, (Ky.) 91 S. W. 1120;

McCabe v. Farnsworth, (Mich.) 27 Mich, 52;

Pullman Co. v. Kelly, (Miss.) 38 So. 317;

Sarazin v. Union R. Co., (Mo.) 55 S. W. 92;

Dolan v. N. Y. Sanitary Utilization Co. 93 N. Y. S. 217;

Tacoma v. Tac. Lt. & *Water Co.,* (Wash.) 47 Pac. 738;

Counsel, under the heading *"Quantum Meruit,"* quotes Article II, section 1, of the by-laws, providing that

> "It shall be the duty of the president to preside at all meetings of the directors and stockholders, and to sign with the secretary all bonds, deeds, certificates of stock, promissory notes, or other instruments in writing made or entered into in behalf of the Company"

and contends that the payment to the president of $12,000 a year, and two and one-half per cent bonus, was for the performance of these duties, and that as the liquidation of the company was not within these duties, there was an implied contract to pay him for such liquidation. This argument is plausible, but unsound. If defendant received $12,000 a year solely for performing the duties above enumerated, the minutes and testimony fail to disclose this fact, and as there was no preceding resolution, or contract, authorizing him to receive such a salary, an action could lie on our part to recover same. But, the whole record shows that the defendant acted as general manager and practically ran the company from

1912 to October, 1918, (Trans. pp. 110, 179), and that his duties up to November, 1917, were to run an active corporation, and that from November 1, 1917, until the end of December, the company was in process of liquidation, and his duties were to liquidate a dormant corporation; and that his pay from 1912 to November, 1917, was for running a going concern, and from November, 1917, to September, 1918, (at which time the need for the president ceased), for assisting in liquidating a retiring corporation. This statement is borne out by the record. Thus, on April 24, 1918, the trustees approved of the sale of all of the Tacoma plant and assets in Alaska and its steamers and a sale of four markets and a ranch and lease, and resolved to reduce the capital stock from a million to five hundred thousand dollars (see exhibit 1, p. 321), and on May 31, 1918, the stockholders approved all of the sales made by the officers and resolved that

> "Whereas it is the desire of the stockholders that the company should be liquidated, and all of its assets sold, and that a return of capital be made as speedily as possible, therefore,
>
> "Be It Resolved, That the officers of this company are directed to sell and dispose of all of the assets of the company as rapidly as possible, and wind up its affairs, returning to the shareholders the amount realized therefor."

and again on July 10, 1918, resolved that

> "Whereas, at the annual meeting of the stockholders of this company, held on May 31, 1918, it was resolved that this company should

be liquidated and all of its assets sold and a return of capital made as speedily as possible, therefore,

"Be It Resolved, That the stockholders present in person and by proxy, hereby confirm and approve the said resolution and authorize, and empower the trustees to make all contracts, agreements and sales necessary to be made, to fully carry out said resolution, hereby confirming and approving what they may do in the premises."

So that Richardson, of his own initiative, liquidated the assets, and the board of directors by express authority authorized and directed him to dispose of the assets of the company and ratified his past acts. The officers of the corporation in one resolution were authorized to sell and dispose of the assets. If Richardson was entitled to be paid on a *quantum meruit* an additional sum to his regular annual salary, then so was Denman, Moore, Davis and the other officers of the corporation, because they did practically nothing else from November, 1917, on. The defendant is riding this implied agreement horse to death. It is clear that there could be no implied agreement to pay the defendant five per cent commission for his services when he is already receiving $12,000 a year for the same services.

All of the cases cited by counsel for the defendant in error are cases where the director or trustee was clearly acting outside the scope of his duties, but in this particular case on May 31, 1918, it was resolved that the company should be liquidated and the defendants Stacy, Miller, Davis, Seddon and

Moore were appointed as trustees to carry out this purpose, and on July 10, 1918, the stockholders expressly authorized and empowered such trustees to make all contracts, agreements and sales necessary to liquidate the company. (See Exhibit 1, minutes p...). So that the Trustees, on May 31, 1918, directed all of the officers to liquidate the company, and on July 10, 1918, expressly imposed on defendant and the other trustees the duty of liquidating the company, and did not make any provision for his compensation until after these duties had been performed, and that too, by an *ex post facto* resolution passed by a board of dummy directors under his dominion and control and picked by himself by use of proxies he held.

The facts in this case afford every reason to apply the rule prohibiting compensation not provided for in advance. All of defendant's pleading and his evidence shows a consistent scheme of deception practiced upon the shareholders. He says in his pleadings that he was required to certify to the alleged correspondent of the foreign shareholders all resolutions of the Board of Trustees. The fact that he procured no such resolution in 1912 when he commenced taking the two and one-half per cent from the corporate funds in addition to his salary, shows his claims to their consent are without foundation and he did not want them to know what he was taking. So also his failure to provide for the five per cent by resolution when liquidation was determined upon . In September, 1918, he lulled the share-

holders by a formal resolution discontinuing his salary. Not even then, months after the work of liquidation had been going on did he openly provide for any further compensation. He did not dare even then to submit his claims to the scrutiny of the shareholders.

If Richardson did not cause his salary to be provided for by resolution in 1912, the reason is that he schemed for more. A sanctioned resolution for only one thousand dollars a month would have stopped him at that. Honesty and fidelity to a trust demand strict application of the rule in this case. Shareholders have little enough protection as it is, and that little through costly, vexatious litigation which amounts to a denial of justice to men of small means. No such chance should be afforded for dishonesty to triumph and honesty to be the light that fails. Economic and moral considerations both control this case and we respectfully submit that the plaintiff in error should prevail.

Authorities Sustaining Court's Rulings in Our Favor

Since the foregoing was printed this Court on the oral argument extended us the privilege of presenting authorities sustaining the rulings in our favor by the trial Court—rulings not appealed from by the defendant.

We respectfully submit that the cases cited in the first part of this brief clearly show that this court has not jurisdiction to consider alleged errors

not appealed from by the court. We gladly avail ourselves of the privilege extended by the Court and following are the authorities upholding the rulings of the lower court against the defendant, showing that our pleadings stated a cause of action, that the Pacific Cold Storage Company is neither a necessary or a proper party, and that this action is one at law and not an equity suit. To save the time of the Court we take the liberty of briefly repeating the pertinent paragraphs of our brief. Our citations possess the merit which defendants citations do not —that of being in point.

FACTS OF CASE

The plaintiff alleges in paragraph 1 of his first cause of action the legal existence of the Pacific Cold Storage Company from the 8th of April, 1897, until the first day of May, 1918, and then uses the following language:

"That after May 1, 1918, said corporation ceased to do business and on May 31, 1918, at the regular annual meeting of the stockholders of said corporation for that year said stockholders voluntarily and unanimously voted to dissolve said corporation and instructed its officers and trustees to sell all of its property, collect all money due to it and distribute the proceeds and all accumulated funds to its stockholders; that from and after the first day of May, 1918, the said company did no new business and abandoned the purposes for which it was incorporated and disposed of an integral and major part of

its assets and paid all of its debts and was dissolved on or before July 1, 1919, and that a formal order of dissolution was made and entered on the 2d day of June, 1919, in the Superior Court of the State of Washington in and for Pierce County.

II

"That the capital of said corporation from and after April 10, 1901, was the sum of One Million dollars divided into ten thousand shares of the par value of One Hundred Dollars each. That at the time said corporation ceased to do business Frederick L. Denman owned 60 of said shares; that said shareholder remained at all times since owner of the funds of said corporation to be distributed to him upon dissolution on his shares as such former stockholder.

III

"That during the existence of the said Pacific Cold Storage Company the profits realized from its business each year were in part declared to be dividends and to the amount so declared paid as dividends to the shareholders of said corporation; that the profits not so declared to be dividends were retained and accumulated by said company and at the time said company ceased to do business and dissolved were available to said shareholders with the exception of the portion unlawfully appropriated by defendant as stated in following paragraphs.

IV.

"That in each year commencing with the year 1912 and ending with the year 1918 the defendant,

without authority from said corporation, its trustees or its stockholders, and while acting as Trustee and President, wrongfully and unlawfully misappropriated and converted to his own use from said accumulated funds and undivided profits an amount equal to two and one-half per cent of amount paid to said shareholders as dividends, as follows, to-wit:

Date	Dividends	Amount Taken
January, 1912	$100,000.00	$2,500.00
January, 1913	100,000.00	2,500.00
January, 1914	100,000.00	2,500.00
January, 1915	60,000.00	1,500.00
January, 1916	80,000.00	2,000.00
January, 1917	80,000.00	2,000.00
January, 1918	200,000.00	5,000.00

Total Dividends $720,000.00.

Total taken by Defendant, $18,000.00.

V.

"That of the amounts so wrongfully and unlawfully taken as above set forth there belonged to the stock of F. L. Denman and became due therein from the defendant on dissolution of said corporation the sum of $108.00 and interest on said amount at the legal rate of six per cent per annum from and after the 31st day of May, 1918, the date of the dissolution of said company."

In paragraph "VI" plaintiff sets forth when he acquired his shares.

The second cause of action is on the assigned claim of Miller and pleads substantially the same

facts as set forth in the first cause of action, the only difference being in the figures and dates.

In the third cause of his action paragraphs "I" and "II" are the same as paragraphs "I" and "II" of the first cause of action. And then the third cause of action alleges as follows:

III.

"That while acting as such trustee for the shareholders after said company had ceased to do business, the defendant without any consideration whatever, wrongfully, and unlawfully appropriated to his own use from the capital return of said corporation, certain sums at the times and in the amounts stated as follows, to-wit: In or about the month of January, 1919, the sum of $25,000.00; in or about the month of June, 1919, the sum of $25,-000.00; and in or about the month of January, 1920, the sum of $2,500.00, making a total of funds so misappropriated by the defendant to his own use in the amount of $52,500.00; That the amount to taken was $5.25 for each share and included $315.00 belonging to F. L. Denman on his 60 shares.

IV.

"That there is now, therefore, due and owing from the said Charles Richardson for money so had and received by him to the use of the plaintiff the sum of $315.00 together with interest at the legal rate of six per cent per annum on said amount from and after the month of January, 1920."

And then said paragraph "IV" alleges a formal demand.

In paragraph "V" the plaintiff sets forth the date of acquisition of his shares.

The fourth cause of action is on the assigned claim of Miller and sets forth substantially the same facts as in the third cause of action with only such modification as is necessary in numbers of shares and figures and dates.

Rights of Stockholders in Assets of Dissolved Corporation

What is the law on these facts? Judge Miller says in 21 Fed. Cas. page 311:

> "That in case of an incorporated company with a capital stock divided into shares, and held by individuals, the corporation and the shareholders are distinct legal persons, and can sue and be sued by each other.
>
> "When the directors of a corporation have misapplied a portion of its funds to which a shareholder has a distinct right, as, for instance, a dividend, he may, in an action, recover the amount misapplied; and when such misapplication has not been effected, but is threatened, he may, by bill in equity for an injunction, prevent it."

So that if either a corporation or an individual misappropriates a dividend on my stock I can sue either the individual or the corporation, and why? Because I have the legal and equitable right to that

dividend. The corporation ship has landed that much of her cargo and it is mine.

It follows as a natural corollary from the above quoted law that when a corporation has gone out of business and is in process of liquidation and has paid all outstanding debts, the corporate property whether in form of real estate or cash, is no longer the property of the corporation and as such subject to whatever disposition may be decreed by the majority of the stockholders but is the several separate vested property of each individual stockholder of which he can not be deprived without his consent; and if the corporate officers wrongfully deprive anyone of the stockholders of his capital stock or any part thereof, it would be an individual and not a corporation injury and he could bring suit against such officers in his own name, and the corporation would be both an unnecessary and an improper party to the suit.

Thompson on Corporations, Sec. 6589;

Slee vs. Bloom, (N. Y.) 10 Am. Dec. 273;

Mason v. Pewabic Co. (U. S.) 33 L. Ed. 524;

Luehrmann vs. Lincoln Trust & Title Co., (Mo.) 112 S. W. 1036;

Aalwyns Law Institute vs. Martin, (Cal.) 159 Pac. 158;

Rossi vs. Caire (Cal.) 161 Pac. 1161;

See also

Eltringham vs. Clarke, (La.) 21 So. 547;

Graycraft vs. National Building & Loan Association, (Ky.) 79 S. W. 923;

Bixler vs. Summerfield et al, 62 N. E. 849;

Von Arnim et al. vs. American Tube Works et al., 74 N. E. 680;

Schoening et al. vs. Schwenk et al., 84 N. W. 916.

In *Thompson on Corporations,* Section 6589, it said:

> "Ordinarily and in the absence of debts, the stockholders, on dissolution of the corporation, become the owners of and entitled to the distribution of its assets. And even where the existence of the corporation is continued by statute for the purpose of winding up, if the debts are paid there is no reason why the stockholders may not at once take the property and distribute it as they may see fit."

In *Mason vs. Pewabic Mining Co.,* (U. S.) 33 L. Ed. 524, the court uses the following language:

> "We know of no reason or authority why those holding a majority of the stock can place a value upon it as which a minority must sell or do something else which they think is against their interest more than a minority can do. We do not see that the rights of the parties in regard to the assets of this corporation differ from those of a partnership on its dissolution."

So in the absence of debts the stockholders on dissolution are the owners of all of its assets whether capital stock or accumulated dividends. Even if a receiver were winding up a corporation and all of its debts had been paid and the receiver withheld and refused to return to any one of the stockholders his capital stock or accumulated profits or any part

thereof, the stockholders would have a right of action against and could sue the receiver. If one or five trustees were winding up a dissolved corporation and it was shown that all of its debts were paid and that all or any one of such trustees were misappropriating or withholding the capital stock or accumulated profits of any one of the stockholders, such stockholder could sue one or all of such trustees. But according to the learned counsel for the defense the stockholder could not sue the receiver. The receiver must sue himself. Or, in case of the trustees the stockholder could not bring an action against the trustees for their own wrong but must ask the trustees to redress their own wrong. I know of no better exposition of the fallacy of this reasoning than the following language used by Judge Neterer in the decision filed in this case on May 8, 1920, where he says:

> "nor do I think that there is a misjoinder of parties plaintiff or defendant, where an officer or trustee of a corporation is guilty of misconduct equivalent to a breach of trust, or where they stand in a dual relation which prevents an unprejudiced exercise of judgment, that it is necessary for a stockholder to exhaust his remedies through the corporation or to show by allegations that the corporation is in the control of the alleged wrongdoers. This was stated by the Supreme Court in *United Copper Co. v. Heinze,* 224 U. S. 265. It is clearly stated in the amended complaint that the defendant wrongfully appropriated the various sums. It likewise appears in the second cause of action that the liquidation of the corporation was affected July 1, 1919. Under the laws of Washington,

the trustees, upon the dissolution of a corporation, become trustees for the shareholders. Upon the dissolution of the corporation, the defendant became one of the trustees of the stockholders, and persons entitled to dividends, and an obligation rested upon him to account to the plaintiffs for the dividends to which they were entitled, and upon failure to account for the dividends, a cause of action arose against the trustee. The fact that there may have been other trustees would not require the plaintiffs to pursue such trustees as joint wrongdoers. The plaintiffs could elect to pursue any or all of the wrongdoers. The demurrer is a general demurrer to both counts, and a cause of action is stated."

Again in his opinion filed on July 12, 1921, Judge Neterer uses the following language:

"By the same token upon the dissolution of a corporation, the trustees at the time of the dissolution shall be trustees of the *creditors* and *stockholders*, Sec. 3707 Rem. & Bal. Code 'and shall have full power and authority to sue for and recover the debts and property of the corporation.' Upon dissolution of the corporation, the corporate entity ceased. The corporation has no power to sue. All rights of the corporation are ended, and the property and funds of the corporation are vested in the trustees for the *stockholders*. All debts are paid, it is alleged. The trustees are trustees not of the corporation, but by operation of statute, of the individual stockholders, to the extent of the interest of the stockholder in the fund or property. If the trustee is guilty of wrongdoing, the remedy of the stockholders cannot be through the corporation because it has no entity. It is alleged that the defendant misappropriated the funds while acting as trustee for the stockholders. There is, therefore, no occasion for any action on the part

of the trustee. It is charged that the defendant trustee has the funds, and declines to account for them, nor is it necessary to bring an action to declare a trust, as in *Southern Pacific Co. vs. Bogert,* 250 U. S. 483, or in *Barker vs. Edwards,* 259 Fed. 484, because the trust is established by statute. The action is not in tort but for money had and received, and can be maintained only against the party who has the funds. *Simmons vs. Spencer,* 9 Fed. 581."

We will not attempt to give over again all of the many cases on which the court's decision is based but will only select one or two well worded decisions.

In the case of *Dill v. Johnson,* (Okla.) 179 Pac. 608, it was held that where a majority of the stockholders have combined to so manage the business of the corporation as to divert all the profits of the enterprise from their legitimate destination, and to appropriate them to their own use, and have in part executed their plan, and the circumstances render any change in the personnel of the management impracticable, a proper case has arisen for the intervention of the court to make a division of the assets. And the court on page 611 uses the following language:

"Plaintiff complains that this suit should be in the name of the corporation and permit the defendant to account to the corporation. The evidence discloses that the defendant Dill did or attempted to show that all of this property had been accounted for to the corporation, but the court and referee found otherwise. To apply the rule of the defendant to an action of this kind

in our judgment would be to nullify the decision of the court. The result would be, the court, after deciding that Mr. Dill had appropriated over $20,000 of the corporation's property, and all the property the corporation had to his own use and benefit, it would then say to Mr. Dill, now you, as president and manager of this corporation, proceed at once to collect this from yourself. Could it be said that would grant the plaintiff in this case any relief? It becomes more apparent that this would still be fruitless, for the reason the attorney representing the corporation also represented Mr. Dill and on behalf of the corporation filed a motion asking that the finding of the referee be set aside, and asked that the judgment be set aside. To permit such a procedure, the ultimate effect would be to grant the plaintiff no relief. He would be in the same position that he had been in since the year 1908. He had invested his money in this corporation, received no dividends, and Mr. Dill, according to the findings of the referee, has converted all the property to his own private use."

Another reason of the futility of requiring plaintiff to bring the action in the name of the trustees is that even if he could prevail upon them to bring suit it would be their duty to immediately turn this money over to plaintiff himself. It would be what the law calls a dry trust. The reasoning of the court in the case of *Dill vs. Johnson,* 179 Pac. 608, cited above is pertinent where the court says:

"If there was property except what had been turned into cash, and had not been appropriated by the defendant Dill to his own use, it might have been necessary, as has often been done, to appoint a receiver to take charge of the assets and to wind up the affairs of the corpora-

tion and to distribute the same; but there is no showing of any property that the corporation has, but on the contrary the court finds that it had none.

"All a receiver could do in the case at bar under the judgment would be to collect from Mr. Dill over $20,000 and pay Mr. Johnson his proportionate part and return to Mr. Dill the balance. This would be a useless and unnecessary expense and procedure, and the same result would be reached by directing Mr. Dill to account to the plaintiff herein direct for his proportionate part of the money that Mr. Dill owes the corporation."

The case of *Commonwealth Title Insurance & Trust Company vs. Seltzer,* 76 Atl. 77, was one in which the corporation was still in existence and the defendant was contending that the corporation should have brought the suit on plaintiff's, the stockholder's behalf and the court held that this was unnecessary and used the following language:

"All that the plaintiffs are entitled to recover is the same share of the ascertained profits that they would have received had these profits gone into the treasury of the company, instead of into the pockets of the two defendants; and this was the proportion awarded to each of them by the court below."

Not only do the state courts approve of the stockholder proceeding directly against defrauding officers, directors or stockholders, but also the Federal courts. Thus in the case of *Ervin vs. Ore. Ry. & Nav. Co.,* 20 Fed. 577, it is held that where the corporation is practically dissolved, and all its prop-

erty sold by the action of the directors and a majority of the stockholders, the minority stockholders may maintain a suit in equity directly against the persons who have thus dissolved the corporation, and who have purchased the property at an unfair price, for an accounting, without making the corporation a party. And it was further held in the same case that such a suit may be brought by one or more of the minority stockholders without making the other minority stockholders parties. And the court in that case on page 581 uses the following language:

> "The defendants insist, by their demurrers, that the Oregon Steam Navigation Company is an indispensable party to the controversy. They also insist, in argument, that all of the stockholders of that company are indispensable parties, if the corporation is not a party. There does not seem to be any good reason why the Oregon Steam Navigation Company should be deemed an indispensable party. It is not a going concern. If the sale of the property should be set aside the corporation would be only a dry trustee for the purpose of dividing the property among the beneficial owners."

Again it was held by the Supreme Court of the United States in the case of *Southern Pacific Co. vs. Bogert,* 250 U. S. 482; 63 L. Ed. 1099, that to a suit to require a majority stockholder which, through a reorganization agreement, has acquired all the stock in the reorganized corporation, to account as trustee for the minority stockholders, the old corporation is neither an indispensable nor proper party. And the

court on page 492, L. Ed. page 1108, uses the following language:

> "The Southern Pacific also urges that the suit must fail because the old Houston Company is an indispensable party and has not been joined. The contention proceeds upon a misconception of the nature of the suit. Since its purpose is merely to hold the Southern Pacific as trustee for the plaintiffs individually of the property which it has received, the old Houston Company is in no way interested and would not be even a proper party."

Our action is stronger than the last cited case. The old Pacific Cold Storage Company is dissolved and our purpose is to hold the trustee Richardson for our ascertained certain specific sums of money belonging to us individually which he has misappropriated. Denman is asserting a right against and not through the Pacific Cold Storage Company. His wrong is an individual wrong, not a corporate wrong.

Defendant's citations offered in support of his objection that the corporation and its liquidators have not been made parties apply only to what are known as "stockholders' suits." A stockholder's suit is a creature of equity to enable the stockholder through the corporation to protect his ultimate, indirect, expectant, future prospective interests in property to which the corporation has the legal title and which has not been set apart for the stockholders. Our case relates wholly and altogether to funds actually set apart for shareholders and rightfully coming to them on disslution. When defendant urges that the company is an indispensable party, we

answer in paraphrase of the opinion of the Supreme Court in *Southern Pacific Co. v. Bogert,* 250 U. S. 483 (heretofore cited by us): Since our contention is merely to hold Richardson for the funds he has received, the old Cold Storage Company is in no way interested and would not even be a proper party.

Also as Judge Wallace said in *Erwin vs. O. R. & N. Co.,* 20 Fed. 577: The corporation could serve no other purpose than to divide the property among the beneficial owners; but here there is no trustee to dispute the legal title with the defendant; the relief granted will not affect the rights of other shareholders; the conventional relations between shareholders and corporation being at an end, defendant is in the position of a quasi trustee guilty of a fraudulent breach of his trust; that the right of action against him is *ex delcito* and the tort may be considered as several or joint without right of contribution between him and others who may have shared his guilt; that the shareholders have a right to pursue the fund wherever they find it.

Again we answer the defendant in paraphrase of the decision of the Ninth Circuit Appeals in *Barker vs. Edwards,* 259 Fed. 484: That as against liquidators acting under a statute like ours each shareholder may assert a legal as well as an equitable right as a tenant in common as against an unauthorized disposition of the property by the liquidators.

It almost looks as if defendant's attorneys had

used the citations of the losing parties in these last cited cases.

ACTION IS AT LAW

This action must be at law, not in equity. The attorney for the defendant is apparently again attempting to show that this action should have been brought in equity and not at law. The overwhelming weight of authority, state and federal, is against him. In a brief entitled "Memorandum of Authorities" showing that the court of law has jurisdiction in this case and not the court of equity, the court will find the following language:

The law controlling this case is found in Ruling Case Law, 10 R. C. L., page 274, where the note uses the following language:

> "The rule adopted in the great majority of American jurisdictions, however ,is that whenever a court of law is competent to take cognizance of a right, and power to proceed to judgment which affords a plain, adequate, and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury. And in some courts, *notably the Federal Courts,* this rule is made obligatory by virtue of the existence of an express statutory prohibition against a party pursuing his remedy in such cases in a court of equity."

Again the author says on page 276:

> "But as a general proposition it may be said that whenever the object of a bill in equity is to obtain only a decree for the payment of money by way of damages, it will not be sustained when

the like amount can be recovered at law in any action sounding in tort or for money had and received."

Pomeroy's Equity Jurisprudence, 3d edition, 1st vol., page 216, section 178, lays down the rule as follows:

"Even when the cause of action, based upon a legal right, does involve or present, or is connected with, some particular feature or incident of the same kind as those over which the concurrent jurisdiction ordinarily extends, such as fraud, accounting, and the like, still, if the legal remedy by action and pecuniary judgment for debt or damages would be complete, sufficient, and certain—that is, would do full justice to the litigant parties— in the particular case, the concurrent jurisdiction of equity does not extend to such case. For example, whenever an action at law furnish an adequate remedy, equity does not assume jurisdiction because an accounting is demanded or needed; nor because the case involves or arises from fraud; nor because a contribution is sought from persons jointly indebted; nor even to recover money held in trust, where an action for money had and received will lie."

The brief then cites *Buzard vs. Houston* (Tex.) 199 U. S. 347, 30 L. Ed. 451, and quotes from L. Ed. page 453, Judge Gray, to the following effect:

"The effect of the provision of the Judiciary Act, as often stated by this court, is that 'Whenever a court of law is competent to take cognizance fo a right, and has power to proceed to judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity ,the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury."

We then cite *Hipp vs. Joly,* 60 U. S. 271, 15 L. Ed. 633; *Gaines vs. Miller,* 111 U. S. 395, 28 L. Ed. 466; *Patton vs. Major,* 46 Fed. 210; *Frank vs. Morley's Estate,* 64 N. W. 578.

On page six we quote from *Downs vs. Johnson* (Vt.) 56 Atl. 9, where it was held that

> "Where the only ground for equitable jurisdiction is that the money sought to be recovered is held in trust, the bill cannot be maintained, as money so held may be recovered in an action at law."

We also cite *Henchey vs. Henchey,* (Mass.) 44 N. E. 1075. In that case on page 1076 the court says:

> "Where there is or has been a trust, and it it the duty of the trustee to pay to his *cestui que* trust a definite sum of money on demand, and nothing else remains to be done, an action at law can be maintained by the *cestui que trust.*"

The language is peculiarly applicable to this case. All that remains to be done here is for the defendant Richardson to pay over the money due the plaintiff, and judgment for the amount due is a speedy and adequate remedy.

Collar vs. Collar, (Mich.) 42 N. W. 847.

Respectfully submitted.

G. P. Fishburne,
A. H. Denman,
Attorneys for Plaintiff in Error.

In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 3993

FREDERICK L. DENMAN,
Plaintiff in Error

vs.

CHARLES RICHARDSON,
Defendant in Error

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE JEREMIAH NETERER, JUDGE

ANSWER TO REPLY BRIEF OF PLAINTIFF IN ERROR

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We do not consider it necessary to review more than a few of the decisions referred to in the reply brief of plaintiff in error. On pages 19 and 20 of the reply brief, extracts from two opinions of Judge Neterer are set forth. In the one the action

is treated as a tort on the part of Richardson against the corporation. In the other, the action is regarded as one for money had and received. This merely indicates the changing position of counsel for the plaintiff.

But the seventh amended complaint alleges that the money of the corporation was wrongfully and unlawfully appropriated by Richardson and that, I think, is the position that counsel contends for in this court.

On page 21 of the reply brief, counsel refers to the case of *Dill v. Johnson*, 179 Pac. 608. That was an action in equity and the corporation was made a party to the proceeding.

On page 23, counsel cites the case of *Commonwealth Title Insurance & Trust Co. v. Seltzer*, 76 Atl. 77. This, also, was a case in equity and the corporation was a party to the suit and in both the Dill case and the last named case, it appeared that it was useless to ask the trustees of the corporation to bring the suit for the reason that they were dominated and controlled by the defendant, who had appropriated the money of the corporations. There is no case, so far as we have been able to find, where an action at law such as in the present case, has been sustained by any court for wrongs

done to the corporation or for money wrongfully received by an officer or trustee of the corporation involved.

On page 24, counsel cites, in support of his contention, the case of *Southern Pacific Co. v. Bogert*, 250 U. S. 482.

It is urged by the plaintiff that the reasoning of this case is controlling in the present action. As we read the case and analyze it, we reach the conclusion that it is conclusive authority in support of the contention of the defendant in this action and we ask the court to carefully read that decision. Mr. Justice Brandeis wrote the opinion in the Bogert case. In the statement of facts he says:

"In 1888 and for some years prior thereto, the Southern Pacific Company dominated the Houston & Texas Central *Railway* Company, electing directors and officers through one of its subsidiaries, which owned a majority of the Houston Company stock. In 1888, pursuant to a reorganization agreement, mortgages upon the Houston Company property were foreclosed, and these were acquired by the Houston & Texas Central *Railroad* Company; the old company's outstanding bonds were exchanged for bonds of the new; all the new company's stock was delivered to the Southern Pacific; its lines of railroad were incorporated in the trans-

continental system of that corporation; and the minority stockholders of the old Houston Company received nothing. In 1913 the appellees, suing on behalf of themselves and other minority stockholders, brought this suit in the Supreme Court of New York to have the Southern Pacific declared trustee for them of stock in the new Houston Company and for an accounting. * * *

"There had been issued by the old Houston Company 77,269 shares of stock, and by the new 100,000 shares. The decree declared that the Southern Pacific held for plaintiffs and other stockholders who intervened, 24,347.9 shares in the Houston Company, directed that it should deliver to them these shares and also in cash the sum of $702,336.61 (being the aggregate of all dividends paid thereon) and interest thereon from the times the several dividends were received, upon receiving from them 18,816 shares in the old Houston Company and also with each share of old stock delivered, $26.00 in cash and interest thereon from February 10,1891."

In its opinion the court further says:

"In considering the many objections urged against the decree, it is important to bear constantly in mind the exact nature of the equity invoked by the bill and recognized by the lower courts. The minority stockholders do not complain of a wrong done the corporation or of any wrong done by it to them. They complain of the wrong done directly by the Southern Pacific and by it alone. The wrong consists in its failure to share with them, the mi-

nority, the proceeds of the common property of which it, through majority stockholdings, had rightfully taken control. In other words, the minority assert the right to a pro rata share of the common property; and equity enforces the right by declaring the trust on which the Southern Pacific holds it and ordering distribution or compensation. The rule of corporation law and of equity invoked is well settled and has been often applied. The majority has the right to control; but when it does so, it occupies a fiduciary relation toward the minority, as much so as the corporation itself or its officers and directors. If through that control a sale of the corporate property is made and the property acquired by the majority, the minority may not be excluded from a fair participation in the fruits of the sale."

The court will observe that in the Bogert case; "The wrong consists in its failure to share with them, the minority, the proceeds of the common property, of which it, through majority stockholdings, *had rightfully taken control.*"

The sale of the property by the Houston Company was rightfully accomplished by the requisite votes of the stockholders and directors. The title passed completely. An attempt was made in a former litigation involving the same subject to have the sale declared fraudulent and void, but this was rejected. The court finds specifically that the

corporation rightfully sold the property to the Southern Pacific. If the corporation sold the property rightfully, the corporation itself could not maintain an action for its recovery. The corporation under the reorganization scheme parted with all interest in the property of the Houston Company purchased by the Southern Pacific. The corporation was in no position to maintain an action to recover assets it had rightfully parted with. No cause of action existed in favor of the corporation. The corporation never had the right to maintain an action to recover the assets of the Houston Company. The action brought by the minority stockholders was therefore not a derivative action. The right to recover the property of the Houston Company never belonged to the Houston Company and the court held in the Bogert case that the minority stockholders in that case could not be construed as suing in a representative capacity for the corporation because the corporation had no cause of action itself and therefore that the action could not be derivative or representative for the reason that the corporation never had the right to maintain such action to recover the assets.

But in the present case, it is alleged that Richardson, as president and a trustee of the Pacific

Cold Storage Company, misappropriated large sums of money to his own use. It is not alleged that the money that he appropriated was voted by the corporate officers and trustees to him. The assertion is that he took the money from the treasury of the company. The Pacific Cold Storage Company was a corporation organized under the laws of the State of Washington. It was not dissolved until long after all of the alleged misappropriation of funds had occurred. If Richardson did misappropriate the funds of the corporation while it was yet in existence, it is manifest that the corporation had a right of action against him for the recovery of these assets so misappropriated. The cause of action, if any, in the first instance was vested necessarily in the corporation. If the corporation failed to sue for the recovery of this money appropriated by the defendant, then the plaintiff, before bringing a suit in his own name must have requested the trustees of the Pacific Cold Storage Company to bring the action. If the officials of the corporation refused to bring the action, then the plaintiff, of course, could maintain the action, but for the benefit only of the corporation. If the corporation were dominated by Richardson to such an extent that the corporation could not act,

the suit might be brought by the plaintiff in his representative capacity, but a complaint that fails to allege that the officers of the corporation were requested to bring a suit and refused, or that the control of the corporation was under the domination of the defendant to such an extent that the request would be useless does not state a cause of action.

If the assets of the corporation had been rightfully sold by the corporation to Richardson pursuant to requisite action on the part of the stockholders and trustees for less than their value, the corporation, being under the control of Richardson, then under the authority of the Bogert case, an action to have a trust declared might possibly be an appropriate remedy. But in a case where a wrong was inflicted upon a corporation by a president and trustee by the misappropriation of funds, the right of action rested in the corporation and in the corporation alone. No stockholder could maintain such action without making the necessary allegations contained in Equity Rule 94, as cited in our former brief. In the Bogert case the cause of action never rested in the Houston Company. In this case the cause of action to recover the funds misappropriated without the authority of the board of trustees and stockholders rested in

the corporation alone. In the Bogert case, the cause of action was a direct one and in this case the action is derivative. Again in the Bogert case, 9th subdivision, the court says:

"Equally unfounded is the contention that the Southern Pacifis cannot be held liable because it was not guilty of fraud or mismanagement. The essential of the liability to account sought to be enforced in this suit lies, not in fraud or mismanagement, but in the fact that, having become a fiduciary through taking control of the old Houston Company, the Southern Pacific has secured fruits which it has not shared with the minority. *The wrong lay, not in acquiring the stock, but in refusing to make a pro rata distribution on equal terms among the old Houston Company shareholders.*"

In the present case the wrong lay in Richardson's misappropriating the funds of the company without any action, so far as the complaint shows on the part of the governing officers or trustees of the Pacific Cold Storage Company. The distinction between the Bogert case and the present case seems too clear for doubt or discussion.

If the defendant misappropriated any of the assets of the Pacific Cold Storage Company without the rightful authority of the governing body of the corporate authorities, then he became indebted to the corporation for the amount of his misappropria-

tion. If he received money belonging to the corporation be became indebted to the company for the amount that he had taken. If he was paid money by way of compensation for services by the proper action of the board of trustees, no cause of action would rest in any one. If he did not appropriate the money under proper corporate authority, then he became simply a debtor of the corporation and subject to suit by the corporation. In other words, the corporation would have, under these circumstances, a legitimate claim against Richardson for the amount of money that he owed the corporation. He is simply a debtor of the corporation.

The effect of plaintiff's contention is that by reason of the misappropriation by the defendant, his shares of stock have been depreciated in the proportion that his number of shares bear to the total number of shares of the corporation. In other words, he is attempting to sue a debtor of the corporation for his *pro rata* or *aliquot* part as shown by the number of shares owned by him in the corporation. If plaintiff is permitted to do this in this action, it is hard to conceive of a case where a stockholder would not be permitted to sue the debtor of the corporation for funds owing to the corporation. The long and unbroken line of au-

thorities holding that a stockholder cannot sue directly a debtor of a corporation for moneys owing by him to the corporation, would be swept aside. Had it been the intention of the supreme court in the Bogert case to overrule and set aside all of the former decisions of the supreme court and other courts holding that a stockholder cannot sue directly to recover money from a debtor of the corporation without first requesting the corporation to institute the action, it certainly would have so stated in unmistakable terms. On the contrary, the court does not overrule such authorities but makes the distinction and holds that the facts in the Bogert case did not bring that case within the general rule as set forth in the authorities in our former brief. If this action can be maintained by the plaintiff directly against Richardson, who is alleged to have received money from the corporation and to be a debtor of the corporation, it is difficult to conceive of any case where a stockholder would be denied the right to sue a debtor of the corporation directly, measuring his injury and damages by the proportionate amount of the capital stock of the company that he owned.

The complaint does not state that the money was paid over to Richardson by the corporation, acting

under any resolutions of its governing bodies. The allegation is that he took the money wrongfully and without authority. He owed the duty, if he did, to restore it to the company. There can be no question that the corporation could recover this money if it were taken wrongfully. Therefore it necessarily follows that in effect plaintiff is bringing an action in his represenative capacity for the reason that the corporation or trustees appointed by statute have failed to do so. He has failed to make allegations conformable to equity rule 94. He has failed to make the corporation a party and to show that he has requested the corporation to institute the suit or that it would be useless to do so by reason of the control being vested in Mr. Richardson.

Counsel, on page 23 of the reply brief, cites the case of *Erwin v. Ore. Ry. & Nav. Co.*, 20 Fed. 577.

The same distinction was made by the court in that case, as in the Bogert case. There the O. R. & N. Co., an Oregon corporation, dissolved itself and sold its assets to another company, under the compelling influence of a majority of the stockholders, who went in control of the company. A trust was declared in that case and it was held that the O. R. & N. Co. was not a necessary party. In

that case, too, the court expressly holds that the property was rightfully transferred and conveyed by the old corporation to the new but for an inadequate consideration. A trust was declared. The court held that the action was not derivative or representative, but that inasmuch as the property was rightfully sold by the corporation, the corporation, had no longer any interest in it but that a trust was created which could be enforced without joining the old corporation. It did not hold or intimate that the old corporation had any right of action to recover the property, but on the contrary held that it did not have such right because the corporation was dissolved and the property sold in accordance with the corporation laws of Oregon and with the by-laws of the corporation. It did not hold that an officer or trustee who had misappropriated any of the property without right during the existence of the corporation would be liable to an action on the part of a minority stockholder. In other words, the action is in no sense derivative or representative as in the case at bar.

Counsel also cite the case of *Barker v. Edwards*, 259 Fed. 484, in support of their contention that neither the corporation nor the statutory trustees upon its dissolution, are necessarily parties in an

action to recover the property of the corporation by a stockholder acting independently and not in his representative capacity. An examination of the case, however, wholly fails to bear out plaintiff's contention. Counsel seem to rely very strongly upon this case but it has not the remotest application. This was an action in which certain shares of stock in the Big Seven Mining Company were claimed by two parties. The action was brought to try the title to the shares of stock after the dissolution of the corporation by the expiration of its charter. The real estate of the corporation merely took the place of and became substituted in law for the shares of stock. Had the corporation not been dissolved, under no conditions would it have been necessary to make the corporation a party to the litigation. The court held that upon the dissolution of the corporation the title to the property became vested in the stockholders and that under section 4545 of the revised codes of Montana the grantee or devisee of real property subject to a trust acquires a legal estate in the property as against all persons except the trustees and those lawfully claiming under them. The court says further in the opinion:

"It is said that this is an action to determine title to stock and to have title to stock decreed in trust

for the estate of Jane Barker, deceased, and that, therefore, all the heirs and legatees of the estate are necessarily interested parties, and in no way antagonistic to the claim of plaintiff, except David L. S. Barker, and that all the heirs and the executor and executrix are indispensable parties."

It was not contended that the corporation in this case should be made a party to the suit, or that the statutory trustees were necessary parties. The real objection to the jurisdiction was that the executor and heirs of the estate of Jane Barker were not made parties to the suit.

The court in the Barker case undertook to construe the powers of trustees of a dissolved corporation under the Montana statute, but this was not necessary to the decision but was merely dictum. Furthermore, we do not see how it could have been possible for the trustees of the dissolved corporation to have ever had the right or power to bring an action to determine the ownership of the 427,000 shares of stock in the mining company. The cause of action never rested in the mining company, hence the plaintiff could not be held to have brought a derivative or representative suit. Neither the trustees nor the corporation had the right or power to determine in the first instance the ownership either of the stock or the land which represented the stock

after the dissolution. In fact none of the cases cited by counsel have any application to facts such as the facts in the case at bar.

The fundamental distinction is that the corporation is an indispensable party if the cause of action originally rested in the corporation. For the foregoing reasons, and upon the authorities cited in our former brief, we earnestly contend that the corporation is an indispensable party and that the complaint does not state a cause of action in that it fails to allege that neither the corporation nor the statutory trustees were ever requested to institute suit prior to the commencement of this action. The complaint must fail for want of equity for the reason that it does not comply with equity rule 94.

We desire to call the court's attention to the fact that there is no proof in the record that Charles Richardson dominated or controlled the board of trustees of the corporation or controlled the liquidating trustees fixed by the statute.

All requirements of equity rule 94 apply to all equity actions of this character commenced in the federal courts. They likewise are applicable to an action commenced in a state court and afterwards

removed to the federal court. The same requirements of the equity rule control cases removed from the state court, even though the laws regulating the state courts do not compel the plaintiff to allege the requirements of equity rule 94.

Venner v. G. N. Ry. Co., 209 U. S. 24, 153 Fed. 408.

At the conclusion of the oral argument, counsel asked leave to file a brief in support of his contention that the defendant could not raise in the appellate court for the first time the contention that the complaint failed to state a cause of action. No authorities are cited by counsel in his reply brief upon this point and it is plain that no such authorities exist. If the action be regarded as a suit in equity, it fails to state a cause of action in that it fails to show any compliance, or attempted compliance or excuse for the requirements prescribed by equity rule 94. If it be regarded as an action at law, it likewise fails to state a cause of action for the reason, among others, that there was no privity of contract existing between the plaintiff and the defendant. The cause of action was vested in the corporation or in the liquidating trustees. None of the authorities cited by counsel disclose any facts at all similar to those involved in this action. The

only reason that a stockholder was permitted to commence an action in equity was due to the fact that he had no remedy at law, so that plaintiff may take either horn of the dilemma that he chooses. He must fail, whether the action be regarded as one in equity or one at law.

Respectfully submitted,

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